TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1944

No. 160

ELGIN, JOLIET AND EASTERN RAILWAY COMPANY, PETITIONER,

vs.

G. W. BURLEY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 14, 1944.

CERTIORARI GRANTED OCTOBER 9, 1944.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1943.

No.

ELGIN, JOLIET AND EASTERN RAILWAY COMPANY, A CORPORATION,

Petitioner,

vs.

G. W. BURLEY, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

INDEX.

Index to printed record of proceedings in U. S. District Court i

Clerk's certificate to printed record of proceedings in U. S. District Court 105

Index to Proceedings in U. S. Court of Appeals:

Placita 107

Appearance for Appellants, filed February 24, 1943 107

Appearance for Appellee, filed April 17, 1943.... 108

Order taking cause under advisement, entered October 15, 1943 109

Opinion by Minton, C. J., filed November 10, 1943. 110

Judgment Reversing, entered November 10, 1943. 113

Petition for Rehearing, filed November 26, 1943. 115

Order Denying Petition for Rehearing, entered March 14, 1944 129

Reference to Issuance of Mandate, March 22, 1944. 129

Clerk's certificate 131

Order allowing certiorari 131

TRANSCRIPT AND SUPPLEMENTAL TRANSCRIPT OF RECORD

In the

United States Circuit Court of Appeals

For the Seventh Circuit

No. 8249

G. W. BURLEY, ET AL.,

Plaintiffs-Appellants,

vs.

ELGIN, JOLIET AND EASTERN RAILWAY COMPANY, A CORPORATION,

Defendant-Appellee.

RECEIVED
MAY 28 1943
CLERK

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

THE DUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

TRANSCRIPT OF RECORD FILED FEB. 20, 1943.

SUPPLEMENTAL TRANSCRIPT OF RECORD FILED APR. 22, 1943.

In the

United States Circuit Court of Appeals

For the Seventh Circuit

No. 8249

G. W. BURLEY, ET AL.,
Plaintiffs-Appellants,

vs.

ELGIN, JOLIET AND EASTERN RAILWAY COMPANY, A CORPORATION,
Defendant-Appellee.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

INDEX—RECORD No. 7717.

	PAGE
Placita	1
Complaint, filed Nov. 19, 1940	3
Security for Costs, filed Nov. 19, 1940	7
Summons and Marshal's Return, filed Nov. 27, 1940	7
Motion to Dismiss, filed Dec. 10, 1940	9
Affidavit in Support	11
Exhibit A—Complaint of Brotherhood of Railroad Trainmen against National Railroad Adjustment Board, Nov. 23, 1936	13
Exhibit B—Letter Nov. 23, 1936, McFarland to Rogers	14
Exhibit C—Letter Oct. 28, 1938, Rogers to Williams	16
Exhibit D—Letter Oct. 31, 1938, Rogers to McFarland	24
Exhibit E—Letter Oct. 31, 1938, McFarland to Rogers	25
Exhibit F—Award in No. 7324 of National Railroad Adjustment Board, dated Sept. 6, 1940	26
Notice of motion, filed Dec. 24, 1940	40
Motion to strike motion to dismiss, filed Dec. 24, 1940	41
Order on motion to strike, entered Dec. 24, 1940	42
Motion for Summary Judgment, filed Jan. 13, 1941	42
Reply to motion, etc., filed Jan. 29, 1941	43
Counter Affidavit in support of motion to dismiss, filed Jan. 29, 1941	45
Exhibit A—Constitution and General Rules of the Brotherhood of Railroad Trainmen (Portions of)	50
Exhibit B—Award No. 6788 of National Railroad Adjustment Board, dated Sept. 6, 1940	52

Memorandum of Reply, etc., filed Feb. 6, 1941 61
Exhibit I—Letter May 18, 1939, McFarland to Rogers 69
Letter Apr. 19, 1939, McFarland to Rogers 70
Letter Apr. 18, 1939, Williams to McFarland 71

REPORT OF PROCEEDINGS

Colloquy 73
Decision 80

Summary Judgment, entered Feb. 20, 1941 84
Notice of Appeal, filed May 17, 1941 85
Notice of filing Notice of Appeal 86
Statement of Points 87
Bond on Appeal 88
Order approving Bond on Appeal 89
Motion to Exclude Portions of Defendants' Designation 90
Order on Motion as to Defendants' Designation 91
Designation of Record 92
Additional Designation 93
Amended Designation 94

INDEX—RECORD No. 8249.

Placita 95
Petition, filed Nov. 2, 1942 96
Decree, entered Nov. 13, 1942 99
Notice of appeal, filed Dec. 28, 1942 101
Notice of filing Notice of Appeal 102
Statement of Points 103
Designation of Record 103
Clerk's Certificate 104

1 Pleas in the District Court of the United States for the Northern District of Illinois, Eastern Division, begun and held at the United States Court Room, in the City of Chicago, in said District and Division, before the Honorable John P. Barnes, District Judge of the United States for the Northern District of Illinois on Twentieth day of February, in the year of our Lord one thousand nine hundred and Forty-One, being one of the days of the regular February Term of said Court, begun Monday, the Third day of February, and of our Independence the 165th year. Placita.

Present:

Honorable John P. Barnes, District Judge.
William H. McDonnell, U. S. Marshal.
Hoyt King, Clerk.

2 IN THE DISTRICT COURT OF THE UNITED STATES,

Northern District of Illinois,

Eastern Division.

Harry M. Alderman, F. E. Beecue, W. R. Bramer, G. W. Burley, J. E. Challender, Christine L. S., Paul Garvey, J. M. Harr, A. T. Hatfield, R. P. Jones, M. Kusner, P. F. McNamara, R. L. Miller, T. J. Murray, J. C. Newman, Edward R. Nolan, G. T. Priest, B. F. Smith, W. G. Smith, M. F. Starkweather, L. Strodtbeck, Ernest Thompson, Malcolm L. Young, H. A. Schroeder; *vs.* Elgin, Joliet and Eastern Railway Company, an Illinois Corporation.	No. 2341.

Be It Remembered, that the above-entitled action was commenced by the filing of the following Complaint in the above-entitled cause, in the office of the Clerk of the District Court of the United States for the Northern District of Illinois, Eastern Division, on this the Nineteenth day of November, A. D. 1940.

3 IN THE DISTRICT COURT OF THE UNITED STATES, Filed Nov. 19 1940.

Northern District of Illinois,

Eastern Division.

Harry M. Alderman, F. E. Beecue, W. R. Bramer, G. W. Burley, J. E. Challender, Christine L. S., Paul Garvey, J. M. Harr, A. T. Hatfield, R. P. Jones, M. Kusner, P. F. McNamara, R. L. Miller, T. J. Murray, J. C. Newman, Edward R. Nolan, G. T. Priest, B. F. Smith, W. G. Smith, M. F. Starkweather, L. Strodtbeck, Ernest Thompson, Malcolm L. Young, H. A. Schroeder,

Plaintiffs,

vs.

Elgin, Joliet and Eastern Railway Company, an Illinois Corporation,

Defendant.

Civil Action No. 2341. Jury Requested.

COMPLAINT.

To the Honorable Judge of the District Court of the United States, in and for the Northern District of Illinois, Eastern Division:

Plaintiffs allege:

1. That more than one half of the plaintiffs herein are citizens of the State of Indiana and the defendant herein is a corporation incorporated under the laws of the State of Illinois. The matter in controversy exceeds, exclusive of interest and costs, the sum of $3,000.00.

2. That on or about July 27, A. D. 1934 and subsequent thereto, they entered the employment of the defendant, under a written contract of employment, the original of which will be produced at the trial hereof, which had previously been obtained by the Brotherhood of Railroad

4 Trainmen under date of April 1, 1927. Said contract among other things contains Article 6 which is in words and figures as follows:

"(A) Regularly assigned yard crews will each have a fixed starting time and the starting time of a crew will not be changed without at least forty-eight (48) hours advance notice. Present practice as to the handling of transfer crews is not affected by the foregoing.

No yardman will be required to work more than one (1) assigned period in any twenty-four (24) consecutive hours.

(B) Yard crews shall have a designated point for going on duty, and a designated point for going off duty.

Starting time of yard crews on one, two or three 8-hour shifts will be as follows:

7 a. m., 8 a. m. and 8:30 a. m.

3 p. m. and 4 p. m.

11 p. m., 12 midnight, and 12:30 a. m."

except in hot metal and cinder, coke oven, Buffington and Waukegan districts, in one, two or three shifts, starting time will be 6:30 a. m., 7 a. m., 7:30 a. m., and 8 a. m.; 2:30 p. m., 3 p. m., 3:30 p. m., and 4 p. m.; and 10:30 p. m., 11 p. m., 11:30 p. m., and 12 o'clock midnight.

Starting time for Stockton engines will be 6:30 a. m., 1:30 p. m. and 8:30 p. m.

Starting time for yard crews handling ore at South Chicago will be 6 a. m. and 1 p. m.

Starting time for yard crews handling coal and ore at Gary will be 6 a. m. and 1 p. m.

Starting time for yard crews assigned to coal loading and unloading at East Joliet will be 6:30 a. m.

Whenever two standards of time are established, starting time may be changed one hour from period above provided."

3) That therein and thereby the defendant agreed with plaintiffs herein to observe definite starting times for the crews of which plaintiffs were then members. That said plaintiffs on July 27, 1934, and continuously from that date to November 15, 1938, were members of the Brotherhood of Railroad Trainmen.

4) That the authorized officials of said plaintiffs, for and on their behalf verbally agreed to suspend the operation of said scheduled Article 6 of said agreement as aforesaid, for a period of thirty days only, to enable the industry to become adjusted to the new schedule; i. e. until August 26, 1934, at which date said article as to starting time was to go into effect. To which the plaintiffs, and the

defendant by and through its duly constituted officials agreed.

5) That contrary to said agreement and the contract of employment as aforesaid, said defendant on August 26, 1934, refused, and continuously to and including November 14, 1938 has refused to abide by the terms thereof.

6) That your plaintiffs and each of them have at all times been ready, willing and able to perform, and have performed their part of said agreement, insofar as they were able, and have at various and sundry times since August 26, 1934, made demand upon the defendant to perform the terms thereof, as required by said agreement aforesaid.

7) That the plaintiffs herein have duly performed the other terms of said contract in and about the settlement of the plaintiffs' controversy with the defendant; they did confer and lodge protests with the various officials of the defendant including the local officials, General Superintendent and the Vice President, as required by Article 25 of said agreement which is as follows:

"Any controversy arising as to the application of the rules herein agreed upon to the Schedule shall be taken up by the local committee and the local officials. In the event of failure on their part to agree upon a satisfactory basis of settlement, the General Committee may take up the question with the General Superintendent, and in the event of their failure to agree upon a satisfactory settlement, the Committee may appeal to the Vice President."

But that said plaintiffs have, to the date hereof, been unsuccessful in arriving at any settlement of their claims.

6 8) That under the terms of said agreement aforesaid, each ~~of the plaintiffs~~ herein are entitled to pay for an additional day, at time and one-half, at the regular daily rate from August 26, 1934, to and including November, 14, 1938, for each foreman and each helper, for each day they were required to work in yard service in the "Whiting Yard" of defendant, in accordance with the established practice among railroads and employees thereof, and as provided in said Article 6 of said agreement aforesaid.

9) That by reason of the violation of said agreement as aforesaid by the defendant, the approximate following amounts with interest thereon at five percent (5%) per

annum from the date due until paid, are owed plaintiffs by defendant as follows:

Harry M. Alderman	$ 4,200.00
F. E. Beecue	6,000.00
W. R. Bramer	14,000.00
G. W. Burley	7,000.00
J. E. Challender	4,500.00
L. S. Christine	7,000.00
Paul Garvey	14,000.00
J. M. Harr	3,000.00
A. T. Hatfield	7,000.00
R. P. Jones	6,974.00
M. Kusner	7,000.00
P. F. McNamara	4,800.00
R. L. Miller	7,000.00
T. J. Murray	4,000.00
J. C. Newman	6,000.00
Edward R. Nolan	4,500.00
G. T. Priest	9,000.00
B. F. Smith	6,000.00
W. G. Smith	4,000.00
M. F. Starkweather	4,250.00
L. Strodtbeck	10,000.00
Ernest Thompson	7,000.00
Malcolm H. Young	3,000.00
H. A. Schroeder	6,000.00

Wherefore plaintiffs individually hereby demand judgment against the defendant for the above sums of money set opposite their respective names as aforesaid, with interest thereon from the due date thereof, until paid, and costs of this suit.

John H. Gately,
Attorney for Plaintiffs

9 And on, to wit, the 19th day of November, 1940, came the Plaintiffs by their attorney and filed in the Clerk's office of said Court their certain Security for Costs in words and figures following, to wit: Filed Nov. 19, 1940.

10 DISTRICT COURT OF THE UNITED STATES.

* * (Caption—2341) * *

"It enter itself as security for costs in this cause, and promise to pay all costs which may accrue to the opposite party in this action, or to any of the officers of this Court; and in default of payment by the Plaintiffs of any cost ordered or adjudged to be paid by Plaintiffs hereby agree and stipulate that execution may issue against our property for all costs not exceeding two hundred dollars taxed against Plaintiffs.

Dated this 15th day of November, A. D. 1940.

United States Fidelity and Guaranty Company, a Maryland Corporation,
By Edmond J. Moroney,
Attorney-in-Fact (Seal)

Acknowledged before me this ..... day of ....., 19....

.....
Clerk.

Certificate as to Attorney-in-Fact hereto attached not copied.

(Endorsed) District Court of the United States * * (Caption—2341) * * Summons in Civil Action Returnable not later than 20 days after service. Filed Nov. 27, 1940 Hoyt King, Clerk John H. Gately, Attorney for Plaintiff.

Marshal's Return.

Served this writ, together with copy of the Complaint, on the within named Elgin, Joliet & Eastern Railway Company, an Illinois corporation, by delivering copies thereof to H. I. Allen, Attorney, an agent of said corporation, this

22nd day of November, A. D. 1940. The President of said corporation not found in my district.

William H. McDonnell,
United States Marshal,
By Wm. Raff,
Deputy.

Marshal's Fees

1	Service	$2.00
1	Miles	.06
	Total.....	$2.06

Filed Nov. 27, 1940.

7 And on, to wit, the 27th day of November, 1940, there was filed in the Clerk's office of said Court a certain Summons with Return of U. S. Marshal endorsed thereon in words and figures following, to wit:

8 DISTRICT COURT OF THE UNITED STATES.

* * (Caption—2341) * *

SUMMONS.

To the above named Defendant:

You are hereby summoned and required to serve upon John H. Gately, plaintiff's attorney, whose address 134 South LaSalle St., Chicago, Illinois, an answer to the complaint which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

Hoyt King,
Clerk of Court.
By Ann G. Joyce,
Deputy Clerk.

(Seal)

Date: November 19, 1940.

(Endorsed) District Court of the United States * * (Caption—2341) * * Security for Costs Filed Nov 19 1940 at 1 o'clock P. M. Hoyt King, Clerk John H. Gately, Atty.

11 And on, to wit, the 10th day of December, 1940, came the Defendant by its attorneys and filed in the Clerk's office of said Court its certain Motion to Dismiss in words and figures following, to wit: Filed Dec. 10, 1940.

12 IN THE DISTRICT COURT OF THE UNITED STATES.

* * (Caption—2341) * *

MOTION TO DISMISS.

Elgin, Joliet and Eastern Railway Company, defendant in the foregoing entitled case, by Harry I. Allen and Paul R. Conaghan, its attorneys, hereby moves that the complaint herein be dismissed for the reasons that (a) this Court lacks jurisdiction over the subject matter and (b) the plaintiffs have failed to state a claim upon which relief can be granted.

As a basis for this motion the defendant states:

1. The plaintiffs, on July 27, 1934, and since that date continuously until the date hereof, were members of the Brotherhood of Railroad Trainmen, a labor organization. On October 31, 1938, the Brotherhood of Railroad Trainmen entered into a written compromise agreement with the defendant relating in part to the dispute regarding the starting time during the period beginning July 27, 1934, and continuing until the date of said compromise agreement, for yardmen, including the plaintiffs, in the Standard Oil Company switching yard at Whiting, Indiana (referred to in the complaint as the "Whiting Yard"); that said agreement provided, inter alia, that
13 the settlements set forth therein should be "a complete settlement" of all claims relating to the starting time of yardmen, including the plaintiffs, in the Standard Oil Company switching yard at Whiting, Indiana, and also, that "no other claims covering the same or like situations will be presented when such claims arise from causes occurring prior to the date of this settlement."

2. The Brotherhood of Railroad Trainmen was selected by the plaintiffs as their representative to present to the officials of the defendant and to compromise the claims of the plaintiffs resulting from the interpretation or application of Article 6 of the agreement of the defendant with its yardmen concerning rates of pay, rules

and working conditions as applicable to yardmen employed in the Standard Oil Company switching yard at Whiting, Indiana. By the provisions of the said compromise agreement executed on October 31, 1938, the Brotherhood of Railroad Trainmen released all claims of the plaintiffs against the defendant arising out of the alleged violation of Article 6 of the agreement of the defendant with its yardmen.

3. The Brotherhood of Railroad Trainmen was selected by the plaintiffs as their representative to present to the National Railroad Adjustment Board the claims of the plaintiffs resulting from the interpretation or application of Article 6 of the agreement of the defendant with its yardmen concerning rates of pay, rules and working conditions as applicable to yardmen employed in the Standard Oil Company switching yard at Whiting, Indiana. The dispute was referred by the Brotherhood of Railroad Trainmen, as the representative of the plaintiffs, and by the defendant to the appropriate division of the Adjustment Board with a full statement of the facts, and all supporting data relating to the dispute. On September 6, 1940, the National Railroad Adjustment Board, by order of the First Division, found that it had "jurisdiction over
14 the dispute involved herein. The parties to said dispute were given due notice of hearing thereon. The evidence shows that the parties to the agreement disposed of the claim here made by the letter of carrier dated October 28, 1938, accepted by employees October 31, 1938" and, in accordance with the provisions of the Railway Labor Act, entered an award "Claim denied per Findings." In accordance with the provisions of the Railway Labor Act, the said award is final and binding upon both parties to the dispute.

And in support of this motion and of the facts stated herein as basis for this motion, there is attached hereto the affidavit of T. E. Bond, Vice President of the defendant.

Harry I. Allen,
Paul R. Conaghan,
Attorneys for Elgin, Joliet and Eastern Railway Company, a corporation.
208 South LaSalle Street,
Chicago, Illinois.

15 IN THE DISTRICT COURT OF THE UNITED STATES

For the Northern District of Illinois,

Eastern Division.

Harry M. Alderman, F. E. Beecue, W. R. Bramer, G. W. Burley, J. E. Challender, Christine L. S., Paul Garvey, J. M. Harr, A. T. Hatfield, R. P. Jones, M. Kusner, P. F. McNamara, R. L. Miller, T. J. Murray, J. C. Newman, Edward R. Nolan, G. T. Priest, B. F. Smith, W. G. Smith, M. F. Starkweather, L. Strodtbeck, Ernest Thompson, Malcolm L. Young, H. A. Schroeder, *Plaintiffs,* *vs.* Elgin, Joliet and Eastern Railway Company, an Illinois corporation, *Defendant.*	Civil Action. No. 2341.

AFFIDAVIT IN SUPPORT OF MOTION TO DISMISS.

State of Illinois, }
County of Cook. } ss.

T. E. Bond, being first duly sworn, on oath deposes and says that he is Vice President of Elgin, Joliet and Eastern Railway Company, a corporation, defendant herein; that he makes this affidavit for the purpose of supporting the motion hereto annexed to dismiss the complaint filed herein; that Exhibit "A" hereto attached is a photostatic copy of the complaint filed by the Brotherhood of Railroad Trainmen against the defendant before the National Railroad Adjustment Board on November 23, 1936, relating to the alleged violation of Article 6 of the agreement between the defendant and its yardmen, working daily since July 27, 1934, in the Standard Oil Company switching yard at Whiting, Indiana; that Exhibit "B" attached hereto is a photostatic copy of the letter of the Adjustment Board, dated November 23, 1936, assigning Docket

No. 3537 to the complaint relating to the starting
16 time of yardmen in the Standard Oil Company switching yard at Whiting, Indiana; that Exhibit "C" attached hereto is a photostatic copy of a letter of the President of the defendant, addressed to the General Chairman of the Brotherhood of Railroad Trainmen, dated October 28, 1938, and referring to a compromise settlement of cases and grievances relating to the interpretation or application of agreements of the defendant with its employees concerning rates of pay, rules and working conditions, including Case No. 5 (Docket 3537) then pending before the Adjustment Board; that said offers of settlement set forth in the letter dated October 28, 1938, were accepted in writing by the General Chairman and Secretary of the Brotherhood of Railroad Trainmen on October 31, 1938, as set forth on page 8 of said compromise settlement; that Exhibit "D", attached hereto is a photostatic copy of a joint letter of the defendant and the General Chairman of the Brotherhood of Railroad Trainmen to the Adjustment Board, dated October 31, 1938, advising the Board of the settlement of cases, including Docket 3537, the complaint of the employees relating to starting time of yardmen in the Standard Oil Company switching yard at Whiting, Indiana; that Exhibit "E" attached hereto is a photostatic copy of a letter from the Board to the President of the defendant, dated October 31, 1938, removing case No. 3537 from the docket of the Adjustment Board; that Exhibit "F" attached hereto is a copy of the award in Docket No. 7324 of the National Railroad Adjustment Board First Division, dated September 6, 1940, relating to a second complaint regarding the starting time of yardmen in the Standard Oil Company switching yard at Whiting, Indiana, which second complaint was filed with the Board by the Brotherhood of Railroad Trainmen on May 18, 1939.

T. E. Bond.

Subscribed and Sworn to before me this 11th day of December, 1940.

Daniel J. O'Connell,
(Seal) *Notary Public.*

17 EXHIBIT "A".

BEFORE NATIONAL RAILROAD ADJUSTMENT BOARD

Division Number One

Brotherhood of Railroad Trainmen, versus
Elgin, Joliet & Eastern Railway Company.
Case No. 5.

Statement of Claim:

Complaint of the Brotherhood of Railroad Trainmen against the Elgin, Joliet & Eastern Railway Company, who contracted the work in industrial switching for the Standard Oil Company in their Whiting, Indiana, Plant and placed the employees under the agreement of the yardmen of the Elgin, Joliet & Eastern Railway Company, but failed to put into effect the starting time of yard crews as provided for in the agreement due to making arrangements with the Engineer's Committees that they would be privileged to start the crews at the time that such crews were started while the switching was being done by the Standard Oil Company crews.

The contention of the Elgin, Joliet & Eastern Railway Company being that the Standard Oil Company cannot be serviced without having the engines starting in yard service at such times as the former custom.

The contention of the Committee for the Brotherhood of Railroad Trainmen being that larger and greater concerns with more complicated service are being and have been handled for a great many years with the continuity of service as outlined in the agreement with three shifted engines in yard service. We do not understand that it is the carrier's right to establish an irregular starting time in the Whiting Yard in violation of the agreement between them and the yardmen because of the fact that the Engineers are willing that such be done.

We respectfully request oral argument on Paragraph (B) of Article 6, reading in part as follows:

"Yard crews shall have a designated point for going on duty, and a designated point for going off duty. Starting time of yard crews one, two or three 8 hour shifts will be as follows: 7:00 A. M. 8:00 A. M. 8:30 A. M. 3:00

P. M. and 4:00 P. M. 11:30 P. M. 12:00 midnight, and 12:30 A. M." No exceptions for engines in this class of service.

Yours truly,
C. H. Williams,
General Chairman-BRT-EJ&E System.

48 EXHIBIT "B".

(Letterhead of National Railroad Adjustment Board.)

November 23, 1936.

Mr. S. M. Rogers, President
Elgin, Joliet & Eastern Railway Company
Chicago, Illinois

Mr. A. F. Whitney, President
Brotherhood of Railroad Trainmen
Cleveland, Ohio

Gentlemen:

Our Docket Numbers 3533 to 3543, inclusive, have been assigned as indicated to the following Elgin, Joliet & Eastern Railway Company—Trainmen's cases, which were submitted ex-parte at the instance of General Chairman Williams, representing the Brotherhood of Railroad Trainmen on that railroad:

3533—"Complaint against the Elgin, Joliet & Eastern Railway Company for failure to comply with their agreement with train and yardmen, using the Carnegie-Illinois Steel Corporation's ownership or operation of certain Plants as a subterfuge."

3534—"Complaint against the Elgin, Joliet & Eastern Railway Company for permitting their Yardmasters and Assistant Yardmasters to perform service as yardmen in their yards depriving yardmen of work covered in Article 3 of the agreement."

3535—"Violation of the Agreement in starting yard crews as transfers, who do yard switching, in violation of the established starting time."

3536—"Protest against contracting the hauling of cinders out of the South Chicago Yard and permitting the Pullman Railroad to enter that yard and take cars out of that yard in violation of Article 3 of the Agreement."

3537—"Protest against starting yard engines in the

Whiting, Indiana yard, (Standard Oil Company Plant) in violation of Article 6 of the agreement."

19 3538—"Protest against the use of self propelled cranes owned by the Carnegie-Illinois Steel Corporation to weigh cars in the South Chicago Yard in violation of the agreement."

3539—"Time claim of Yardman W. E. Bertholf, South Chicago Yard for being deprived of work account the Elgin, Joliet & Eastern Railway Company permitting the work to be done by self propelled cranes."

3540—"Time claim of T. Schweir, South Chicago Yard, for being deprived of work account the Elgin, Joliet & Eastern Railway Company permitting work to be done by self-propelled cranes."

3541—"Time claim of H. Linné, South Chicago Yard, for being deprived of work account the Elgin, Joliet & Eastern Railway Company permitting the work to be done by self-propelled cranes."

3542—"Claim of W. O. Wilton for payment of time lost, account dismissed from the service for alleged violation of Rule "G" without a proper investigation under the provisions of Article 18 of the Agreement."

3543—"Claim of Brakeman J. H. Kimberlin, Gary Division, for pay for all time lost when unjustly dismissed from the service for responsibility in a head end collision between Train No. 6 and Extra 702, East, at Hartsdale, Indiana, January 11, 1936."

These cases are assumed to be complete and nothing will be added to them prior to the date of the hearing thereof; however, at the direction of the Board we are sending to the Management copies of the Employees' submissions, and to the General Chairman, with copy of this letter, copies of the Management's submissions.

This is being done in order that both the Management and the Committee may have an opportunity to study the submissions prior to the date set for hearings, information as to which will be given to you later.

It should be understood, however, that any argument presented to the Board at the hearing should be confined to matters incorporated in the submissions.

Yours very truly,

T. S. McFarland,
Secretary.

TSM:WB
Enc.
cc: Mr. C. H. Williams

20 EXHIBIT "C".

(Letterhead of Elgin, Joliet and Eastern Railway Co.)

October 28th, 1938.

Mr. C. H. Williams,
Gen. Chairman, Brotherhood of Railroad Trainmen,
603 Jackson Street,
Joliet, Illinois.

Dear Sir:

Since my letter of August 18th in which I tentatively proposed settlement of certain matters of grievance we have had further correspondence and conferences which have modified our decision in some cases. Therefore, in order that the whole matter be placed in concrete form I am outlining below our proposals to settle all of the cases except as otherwise specified.

Case No. 1—Labor Board Docket #3533—Handling of railroad cars by cranes or other forms of power.

Settled with respect to South Chicago and Joliet by agreements. Said agreements provide that the use of cranes in the handling of railroad equipment is restricted to certain movements set forth specifically in said agreements, coupled with the proviso that all work not so specifically allocated to cranes (or other forms of power) is considered yard work as defined in Article 3 of the Yardmen's Agreement, and will be handled as provided for in said agreement. It is further understood and agreed that in the event similar situations obtain in other yards where tracks are owned by the Elgin, Joliet and Eastern Railway Company that efforts will be made to arrive at a mutually satisfactory agreement respecting the movement in such yards.

Case No. 2—Labor Board Docket #3534—Work of Yardmasters and Assistant Yardmasters.

Settled by the issuance of instructions to the effect that Yardmasters at South Chicago, Joliet Mill Yard, Whiting, (S. O. Yard), Kirk Yard and Mill Yard at Gary, and Waukegan Yard will cease and desist performing work of Yardmen in compliance with Order No. 22839 of the Illinois Commerce Commission dated January 1st, 1935.

Case No. 3—Labor Board Docket #3535—Starting time of transfer engines.

It is agreed that for the future transfer engines starting

at times other than those specified in Article 6 Yardmen's Agreement will not be used in general yard work.

21 Case No. 4—Labor Board Docket #3536—Delivery of cars to Pullman Railroad in South Chicago Yard.

It is understood and agreed that this case now pending before the Labor Board will be left with that body for adjudication.

Case No. 5—Labor Board Docket #3537—Starting time of switch engines in Whiting S. O. Yard.

Settled by agreement that the starting times for a ninety day trial period commencing November 15th, 1938, shall be the times provided for in Article 6 of the Yardmen's Agreement instead of the starting times heretofore agreed upon and now being followed. If at the end of the ninety day trial period the Railway Company or its employees claim that the starting times as fixed in Article 6 do not result in efficient and economical operation and in satisfactions to our employees and to the industry served, then representatives of the Railway Company and representatives of the Yardmen, and representatives of the Engineers and representatives of the Firemen will sit down and work out a schedule of starting time best suited for meeting the special requirements of the industry.

Case No. 6—Labor Board Docket #3538—Weighing of pig iron with cranes in South Chicago Yard.

Settled by agreement between Elgin, Joliet and Eastern Railway Co., and its Yardmen restricting movement of railroad cars by cranes in this yard.

Case No. 7—Labor Board Docket #3723—Handling of water car by cranes in South Chicago Yard.

Settled by specific proviso in agreement covering the movement of cars by cranes in this yard.

Case No. 8—Labor Board Docket #3539—Time claim.

Settled by agreement to pay Mr. W. E. Bertholf Eight Dollars and Three Cents ($8.03).

Case No. 9—Labor Board Docket #3540—Time claim.

Settled by agreement to pay Mr. T. Schweir Eight Dollars and Three Cents ($8.03).

Case No. 9A—Not before Labor Board. Furnishing electric lanterns to Indiana employees.

The Company to furnish electric lanterns to Indiana train and yardmen on same terms as now furnished

22 train and yardmen in Illinois. Mr. Williams to withdraw his request that bulbs and batteries for said lanterns be placed on cabooses in both Illinois and Indiana.

Case No. 10—Labor Board Docket #3541—Time claim. Settled by agreement to pay to Mr. H. Linne Eight Dollars and Three Cents ($8.03).

Case No. 11—Labor Board Docket #3542—Time claim. Settled by agreement to pay Mr. W. O. Wilton Three Hundred Twenty-nine Dollars and Seventy-three Cents ($329.73).

Case No. 13—Labor Board Docket #3510—Time Claim account change in starting time of engine at Whiting (S. O. Yard).

Settled by agreement to pay—

Mr. F. A. Emerson, Eight Dollars and Three Cents ($8.03);

Mr. M. Barsich, Seven Dollars and Forty-five Cents ($7.45);

Mr. S. H. Shearer, Seven Dollars and Forty-five Cents ($7.45).

Case No. 14—Labor Board Docket #3509—Time claim account alleged run around.

Settled on basis presented but without estgblishing any precedent, the following amounts will be paid.

Mr. J. W. Hoover, Six Dollars and Two Cents ($6.02);

Mr. H. Bogart, Five Dollars and Two Cents ($5.02);

Mr. C. Mackin, Five Dollars and Two Cents ($5.02).

Case No. 15—Labor Board Docket #3508—Time claim for handling switches at Dyer.

Settled by agreement to pay Mr. P. E. Miles Seven Dollars and Thirty-three Cents ($7.33).

Case No. 16—Labor Board Docket #3511—Handling of empty cars from Kirk Yard by Gary Mill Yard crew.

Settled by agreeing to pay—

Mr. L. E. Clement, Eight Dollars and Three Cents ($8.03);

Mr. P. Carr, Seven Dollars and Forty-five Cents ($7.45);

Mr. W. Brown, Seven Dollars and Forty-five Cents ($7.45).

It is further agreed that Gary Mill Yard engines will not be permitted to go into Kirk Yard for the purpose of taking back loaded cars or empty cars for loading.

Case No. 17—Labor Board Docket #3543—Time claim account discipline imposed as result of an accident.

Settled by agreement to pay Mr. John Kimberlin, Nine Hundred Fifty-one Dollars and Thirty Cents ($951.30).

23 Case No. 20—Revision of grade in Yard "A", East Joliet.

Settled by agreement to change grade of tracks in Yard "A", East Joliet, at such times when it is necessary to do other work on these tracks.

Case No. 21—Handling of cars by cranes at East Joliet.

Settled by agreement specifically providing the movements which may be made by cranes in this yard.

Case No. 23—Time claim account brakeman held in to act as conductor.

Settled by agreement to pay Mr. L. C. Talley the amount of claim filed—Six Dollars and Thirty Cents ($6.30)—and further agreed that in such future cases the man so held in will be paid not less than the amount he would have received on his regular assignment.

Case No. 24—Handling of locomotives between roundhouse and wye at East Joliet.

Settled by agreement to pay time claims as listed below, and subscribing to the understanding that in future cases of this kind when two locomotives are moved at a time one yardman, who will receive foreman's pay, will be used. If more than two locomotives are so handled a full crew will be used.

Mr. E. R. Smith, Eight Dollars and Three Cents ($8.03);

Mr. M. Brogan, Four Dollars and Sixty-eight Cents ($4.68);

Mr. D. H. Allen, Eight Dollars and Three Cents ($8.03);

Mr. G. Stickel, Four Dollars and Ten Cents ($4.10);

Mr. J. E. McNamara, Four Dollars and Ten Cents ($4.10);

Mr. F. Kremek, Fifty-eight Cents (58¢);

Mr. C. Osman, Twenty-two Dollars and Thirty-four Cents ($22.34);

Mr. F. Jones, Seven Dollars and Forty-five Cents ($7.45);

Mr. W. Linebeck, Fourteen Dollars and Ninety Cents ($14.90);

Mr. W. A. Swinke, Seven Dollars and Forty-five Cents ($7.45);

Mr. C. Allen, Fourteen Dollars and Ninety Cents ($14.90);

Mr. R. Bish, Fourteen Dollars and Ninety Cents ($14.90);

Mr. G. Meifert, Fourteen Dollars and Ninety Cents ($14.90);

Mr. G. Talley, Seven Dollars and Forty-five Cents ($7.45);

Mr. E. Nealis, Seven Dollars and Forty-five Cents ($7.45);

Mr. C. J. Pike, Twenty-nine Dollars and Seventy-nine Cents ($29.79);

Mr. D. W. Reed, Seven Dollars and Forty-five Cents ($7.45);

Mr. J. L. Elens, Fourteen Dollars and Ninety Cents ($14.90);

Mr. C. Z. Cooper, Seven Dollars and Forty-five Cents ($7.45);

Mr. A. Hedlund, Fourteen Dollars and Ninety Cents ($14.90);

Mr. J. J. Shroba, Twenty-two Dollars and Thirty-four Cents ($22.34);

Mr. J. Dutka, Seven Dollars and Forty-five Cents ($7.45);

Mr. V. A. Newell, Fourteen Dollars and Ninety Cents ($14.90);

Mr. L. Simon, Seven Dollars and Forty-five Cents ($7.45);

Mr. R. Cheney, Twenty-two Dollars and Thirty-four Cents ($22.34);

Mr. R. Pike, Twenty-two Dollars and Thirty-four Cents ($22.34);

Mr. W. J. Carlson, Seven Dollars and Forty-five Cents ($7.45);

Mr. C. F. Stoner, Seven Dollars and Forty-five Cents ($7.45);

Mr. P. H. Kane, Fourteen Dollars and Ninety Cents ($14.90).

Case No. 36—Handling engines between Roundhouse and Machine Shop at East Joliet.

Settled by agreement to pay—

Mr. F. R. Wagner, Eight Dollars and Three Cents ($8.03);

Mr. R. Pike, Seven Dollars and Forty-five Cents ($7.45);

Mr. L. Kuhazda, Seven Dollars and Forty-five Cents ($7.45).

Case No. 38—Time claim account yardman working one shift as Assistant Yardmaster and another shift as Yardman during one twenty-four hour period.

Settled by agreeing to pay Mr. H. A. Edwards, Eight Dollars and Fifty-three Cents ($8.53), and with the understanding that, when men are available, yardmen will not be permitted to work more than one shift in any twenty-four hours, and with the further understanding that this means

that a yardman may not work one shift as yardman and another shift as an Assistant Yardmaster (or Yardmaster) in the same twenty-four hours.

Case No. 39—Time claim.

Settlement by agreement to pay—

Mr. A. Holem, Eight Dollars and Fifty-three Cents ($8.53);

Mr. J. B. Massey, Seven Dollars and Ninety-four Cents ($7.94);

Mr. G. A. Hamil, Seven Dollars and Ninety-four Cents ($7.94).

Case No. 40—Time claim.

Settled by agreement to pay—

Mr. F. Rusinski, Eight Dollars and Fifty-three Cents ($8.53);

Mr. G. A. Sidebottom, Seven Dollars and Ninety-four Cents ($7.94);

Mr. H. O'Neil, Seven Dollars and Ninety-four Cents ($7.94).

Case No. 41—Time claim.

Settled by agreement to pay—

Mr. C. S. Wells, Eight Dollars and Fifty-three Cents ($8.53);

Mr. J. V. Golden, Seven Dollars and Ninety-four Cents ($7.94);

Mr. J. E. Clavin, Seven Dollars and Ninety-four Cents ($7.94).

25 Case No. 42—Time claim account failure to notify brakeman of return of conductor to his assignment.

This case involves the failure to notify Brakeman P. E. Miles of the return of regular Conductor for whom Mr. Miles had been substituting at his assignment. Failure to notify Mr. Miles was due to inability to reach him account station employees not having his address. However, without establishing any precedent, case is settled by agreement to pay Mr. Miles Nine Dollars and Seventy-one Cents ($9.71).

Case No. 43—Handling of cars by cranes in Whiting (S. O. Yard). Time claim of Mr. H. M. Alderman, Mr. J. M. Harr and Mr. F. A. Douglas.

Inasmuch as we have no control over the situation we cannot allow these claims.

Case No. 44—Time claim.

This claim involves the displacement of Yard Foreman Hyde on a west side engine at Gary when force was reduced.

Claim predicated on the fact that a certain Assistant Yardmaster was retained in that capacity while an older yardman who had been serving as Assistant Yardmaster was reduced. Disposed of by agreeing to pay Mr. L. A. Hyde Twelve Dollars and Eighty-seven Cents ($12.87), representing the difference between what he actually earned as helper and what he would have earned as foreman of engine.

Instructions have been issued which will eliminate the practice complained of, which is the basis for this claim.

Case No. 45—Time claim of Yardmen J. Harr and F. A. Douglas, account cranes handling cars in Whiting (S. O. Yard).

Inasmuch as we have no control over the situation we cannot allow these claims.

Cases Nos. 46, 47 and 48—All Personal Injury Claims.

These cases have been closed as per your letter of August 27th, 1938.

Case No. 50—Time claim of Yardmen H. Alderman, F. A. Douglas and T. J. Murray, account cranes handling cars in Whiting (S. O. Yard).

Inasmuch as we have no control over the situation we cannot allow these claims.

Cases Nos. 52 and 53—Handling of cars by dinkey engines in Whiting (S. O. Yard).

We have not been presented with specific time claims covering these cases but understand they are similar to the claims filed under cases Nos. 43, 45 and 50. If so, the same conditions obtain and we would be unable to allow such claims if they were presented.

26 Case No. 54—Personal injury claim.

This case has been closed as per your letter of August 27th, 1938.

In addition to the above cases which have been discussed at my office, we will also settle the following time claims for which no case numbers have been assigned. These claims all involve the handling of cars by cranes in the South Chicago Yard.

Case No. 54-A—Time claim August 12, 1937.

C. F. Fox—Eight Dollars and Three Cents ($8.03);

F. X. Lingerman—Seven Dollars and Forty-five Cents ($7.45);

J. B. Murphy—Seven Dollars and Forty-five Cents ($7.45).

Case No. 54-B—Time claim September 3, 1937.

W. A. Ahrendt—Eight Dollars and Three Cents ($8.03);

C. L. Keilman—Seven Dollars and Forty-five Cents ($7.45);
L. A. Floyd—Seven Dollars and Forty-five Cents ($7.45).
Case No. 54-C—Time Claim May 24, 1938.
R. Letcher—Eight Dollars and Fifty-three Cents ($8.53);
C. Ruby—Seven Dollars and Ninety-four Cents ($7.94);
J. Lynn—Seven Dollars and Ninety-four Cents ($7.94).
Case No. 54-D—Time Claim May 26, 1938.
T. P. McNulty—Eight Dollars and Fifty-three Cents ($8.53);
J. Misanin—Seven Dollars and Ninety-four Cents ($7.94);
J. Cross—Seven Dollars and Ninety-four Cents ($7.94).

We have by this letter given you a complete resume of all of the claims which have not heretofore been disposed of, filed by you on behalf of the employees whom you represent and have proposed in this letter a very liberal disposition of all the cases involved. The settlements proposed are predicated on a complete settlement and withdrawal of all cases now pending either before the board, or under discussion with this office except Case No. 4, which it is understood will be left to a decision by the National Railroad Adjustment Board, and it is further understood that in the event these settlements are accepted that the claims listed in this letter cover all claims of a similar nature, and
27 that no other claims covering the same or like situations will be presented when such claims arise from causes occurring prior to the date of this settlement.

Yours truly,
S. M. Rogers,
President.

cc—Messrs. J. E. Reilly,
C. L. Wilson,
C. H. Ireland,
G. E. Chessman.

Accepted for the Yardmen: Oct. 31, 1938.
C. H. Williams,
General Chairman, B. of R. T.
S. F. Johnson,
Secretary, B. of R. T.

28 EXHIBIT "D."

(Letterhead of Elgin, Joliet and Eastern Railway Co.)

October 31st, 1938.

Mr. T. S. McFarland,
Secretary, First Division,
National Railroad Adjustment Board,
220 South State Street,
Chicago, Illinois.

Dear Sir:

The following cases have been settled and we, therefore, jointly request that they be withdrawn from the Docket of the Board:

National Railroad Adjustment Board Docket No. 3533.

Claim of employes that the EJ&E Railway Company is violating Article 3 of Yardmen's Agreement.

National Railroad Adjustment Board Docket No. 3534.

Claim of employes that Yardmasters and Assistant Yardmasters are performing work of Yardmen. * * *

National Railroad Adjustment Board Docket No. 3535.

Claim of employes that Yard Crews are starting as Transfer crews. * * *

National Railroad Adjustment Board Docket No. 3537.

Complaint of employes that yard engines in S. O. Company Plant are being started at times other than those provided in Article 6 of the Yardmen's Agreement.

National Railroad Adjustment Board Docket No. 3538.

Complaint against EJ&E Railway Company because C.I.S. Corporation self-propelled cranes are used in weighing cars. * * *

National Railroad Adjustment Board Docket No. 3723.

Complaint against EJ&E Railway Company for permitting use of self-propelled cranes to perform yard work. * * *

National Railroad Adjustment Board Docket No. 3539.

Claim of R. E. Berthoff * * * August 8th, 1935.

* * *

29 National Railroad Adjustment Board Docket No. 3540.

Claim of E. Schweir * * * August 3rd, 1935. * * *

National Railroad Adjustment Board Docket No. 3541.

Claim of H. Linne * * * September 3rd, 1935 * * *

National Railroad Adjustment Board Docket No. 3542.

Claim of W. O. Wilton * * * between November 10th, 1935 and January 14th, 1935.

National Railroad Adjustment Board Docket No. 3510.

Claim of F. A. Emerson, M. Barsich and S. H. Shearer * * * November 1st, 1935. * * *

National Railroad Adjustment Board Docket No. 3509.

Claim of J. W. Hoover, H. Bogart and C. Mackin * * * January 7th, 1935. * * *

National Railroad Adjustment Board Docket No. 3508.

Claim P. E. Miles * * * November 26th, 27th, 29th, 30th, December 2nd, 4th 5th, 6th, 9th, 10th and 11th, 1935. * * *

National Railroad Adjustment Board Docket No. 3511.

Claim of L. E. Clement, P. Carr and W. Brown * * * August 15th, 1935.

National Railroad Adjustment Board Docket No. 3543.

Claim of John R. Kimberlin for time lost between January 16th, 1935 and his return to work in July, 1935.

Elgin, Joliet and Eastern Railway Company,

By S. M. Rogers,
President.

For the Employes:
C. H. Williams,
General Chairman, B. of R. T., EJ&E System.

EXHIBIT "E."

(Letterhead of National Railroad Adjustment Board.)

October 31, 1938.

Mr. S. M. Rogers, President,
Elgin, Joliet and Eastern Railway Company,
208 South La Salle Street,
Chicago, Illinois.

Mr. A. F. Whitney, President,
Brotherhood of Railroad Trainmen,
Cleveland, Ohio.

Gentlemen:

The parties to claims covered by the following Docket Numbers having requested their withdrawal, they are removed from our docket:

Docket No. 3533 ex parte submission
3534 " "
3535 " "
3537 " "
3538 " "
3723 " "
3539 " "
3540 " "
3541 " "
3542 " "
3510 " "
3509 joint submission
3508 " "
3511 " "
3543 ex parte submission

Yours very truly,

T. S. McFarland,
Secretary.

TSM-wcf
cc: Mr. C. H. Williams, Genl. Chmn. BofRT.

EXHIBIT "F."

Award No. 5048
Docket No. 7324

National Railroad Adjustment Board

First Division

The First Division consisted of the regular members and in addition Referee Paul W. Richards when award was rendered.

Parties to Dispute:

Brotherhood of Railroad Trainmen

Elgin, Joliet and Eastern Railway Company

Statement of Claim: Claim for one day's pay at time and one-half for each foreman and each helper for each day they were required to work in yard service in the Whiting (Standard Oil Company) Yard, in violation of the fixed starting time provided for in Article No. 6 of the Yardmen's Agreement of the Elgin, Joliet and Eastern Railway Company, effective January 1, 1927, and appli-

cable to Whiting (Standard Oil Company) Yardmen, July 27, 1934, from dates of August 27, 1934, until November 14, 1938, inclusive.

Note: Claim made thirty (30) days after agreement was made effective on account of committees agreeing to permit this length of time for yardmen to become accustomed to the changes being made.

Employes' Statement of Facts: The inter-plant switching of the Standard Oil Company at Whiting, Indiana, was turned over to the Elgin, Joliet & Eastern Railway Company on date of July 27, 1934. The Yardmen employed by them were taken off of their payrolls and employed by the E. J. & E. Railway Company and service accepted under the Yardmen's Agreement covering E. J. & E. Yardmen. That agreement provides for a fixed starting time for yard crews in Article No. 6. The starting time provided for was not observed in the Whiting yard until November 15, 1938, at which time the Management agreed with the Brotherhood of Railroad Trainmen to place Whiting yard crews on fixed starting time. The Management always contended that the committees for the organizations agreed with them that the starting time provided for in the Yardmen's Agreement did not need be applied in the Whiting yard. The committees contend that they consented to permitting them to keep the starting times in effect while the work was being done by the Standard Oil Company for a period of thirty days in order that the yardmen might become accustomed to the change.

Position of Committee: This claim is made for payment of time by the Yardmen of Whiting Yard and is supported by Article No. 6 of the Yardmen's Agreement. It is not for this Committee to decide on the veracity of the claims made by either the carrier or the committee negotiating taking over the switching at Whiting. It is the judgment of this Committee that the matter of starting time was of equal importance in arranging the agreement at Whiting as it was when made to cover the yardmen on the E. J. & E. proper. A statement that certain agreements were reached does not support the carriers contention. Even if such agreements were reached it would not be possible to invalidate the prescribed written rule of Article 6. It could be claimed by the carrier that the committees had agreed that the Schedule did not apply to the Whiting Yard, but surely if it or any rule therein was to be understood to not

apply, they should have been confined to writing in order that future committees would understand them.

If the Management and the Committees failed to so negotiate, this Committee cannot give consideration to the claim that it was so negotiated. The part of Article 6 of the Yardmen's Agreement is applicable to the case and supports the claim.

"Article 6, 'A'—'B.'
(in part)

"(A) Regular assigned yard crews will each have a fixed starting time and the starting time of a crew will not be changed without at least forty-eight (48) hours advance notice. Present practice as to handling of transfer crews is not affected by the foregoing. No yardman will be required to work more than one (1) assigned period in any twenty four (24) consecutive hours.

"(B) Yard crews shall have a designated point for going on duty, and a designated point for going off duty. Starting time of yard crews on one, two or three 8-hour shifts will be as follows:

Underlining of the words, 'will be,' is mine.

"7:00 A. M., 8:00 A. M. and 8:30 A. M.
3:00 P. M. and 4:00 P. M.
11:00 P. M. and 12:00 M. and 12:30 A. M."

A request was made by this Committee to Mr. T. D. Beyer, General Manager for a complete list of crews in the Whiting Yard started at times other than the fixed starting time provided for in Article No. 6. Reply is herewith quoted:

"Joliet, Illinois
March 6, 1939.

Mr. C. H. Williams,
Gen. Chairman, B. of R. T.,
603 Jackson Street, Joliet, Illinois.

Dear Sir:

It will not be consistent to furnish information showing starting time of all yard crews from July 27, 1934 to and including November 14, 1938, as requested in yours of March 1st.

I am at a loss to understand the reason for this request as any claim affecting starting time in the Standard Oil

Company yard at Whiting prior to November 15, 1938 was, disposed of by an agreement made between you and Mr. Rogers as covered in letter to you dated October 28, 1938.

Yours truly,

(Signed) T. D. Beven,
General Manager."

In order that all matters be made clear in this case, reference is made by excerpts from letters to the Management by the Committee during the process of negotiation and the agreement reached on date of October 28, 1938, whereby Labor Board Docket No. 3537 was withdrawn from the Board. There were no agreements reached whereby payment for violation of Article No. 6 of the Yardmen's Agreement would be waived as a result of withdrawal of Labor Board Docket No. 3537. In fact that case held no claim
32 for payment for time. It was simply a case to settle the dispute as to the carrier's right to force the yard crews in the Whiting yard to work at times other than the fixed stafting time provided for in Article 6. Certainly there are no words in the agreement reached which implies in any manner that the committee waived the right to claim for payment for violations prior to withdrawal of the case from the Board. It should be clear that by placing the correct starting time into effect that thereafter there were no violations and the clearness in which the provision is written shows that all that was agreed to was, that after a 90 day trial the committees would meet and confer as to whether fixed starting time was feasible. This was done on date of February 27, 1939, and no reason was shown why a change should be made. The decision in the case is as follows:

"Case No. 5—Labor Board Docket No. 3537—Starting time of switch engines in Whiting S. O. Yard.

Settled by agreement that the starting times, for a ninety day trial period commencing November 15th, 1938, shall be the times provided for in Article 6 of the Yardmen's Agreement instead of the starting times heretofore agreed upon and now being followed. If at the end of the ninety day trial period the Railway Company or its employes claim that the starting times as fixed in Article 6 do not result in efficient and economical operation and in satisfaction to our employes and to the industry served, then representatives of the Railway Company and representatives of the Yardmen, and representatives of the Engineers and

representatives of the Firemen will sit down and work out a schedule of starting time best suited for meeting the special requirements of the industry."

Reference is made to my letter addressed to Mr. Rogers on date of August 22, 1938, specifically showing the conclusions reached by them on proposals for settlement of the cases pending. Each case referred to separately. Docket 3537 is referred to in the last paragraph of page two and reads as follows:

"3537—It is noted that despite our offer to place the starting times of Whiting yard crews on a trial for a period of 90 days on their regular starting time, you desire to cut that to 30 days. You refer to a verbal understanding in an agreement between the committees; including my predecessor, that the present starting time would prevail. I am not bound to any verbal agreements of my predecessor had he made one, nor will my successor be bound by one made by me if I make one. However, I will not make one, nor will I consider the one you contend was was made to cover starting time in the Whiting Yard. The record shows, and Mr. Meade confirms that it was agreed to accept the conditions as they were for a period of thirty days. You declined to ever change it and in the absence of a written agreement my committee contends for regular starting time. We do not think a true picture can appear in less than a 90 day trial."

Note: The above should have read that the letter referred to was of August 22, 1938.

Reference is also made to my letter of July 30, 1938 at page three, which also refers to Case 3537. I quote first paragraph.

"It has been contended that it was impossible to operate in this plant on established starting time as provided for in the Yardmen's Agreement of the Elgin, Joliet & Eastern Railway Company. In order to dispose of this case, the engines working in this plant shall be started by the established starting time for a period of three months commencing with the 1st day of September and remain on schedule starting time for a period of three months until December 1st. If by that time there is established proof that injustice is being done, the joint committees of the B. of L. E., B. of L. F. & E. and the B. of R. T. will meet the officials for the purpose of regulation or adjustment."

As stated before, Case No. 5—Labor Board Docket No. 3537 contained no claim for pay to Whiting Yardmen.

Consequently it was not a question before the Management and the Committee in the starting time negotiation and, claim cannot be made that a waiver was made on a matter which was not negotiated. The claim that such was done cannot be supported by any record.

The fact of the matter is, the problem causing concern was the matter of the Carnegie-Illinois Steel Corporation using locomotive cranes to perform switching service within the South Chicago Yard was the factor in obtaining the settlement of cases in the agreement reached on October 28, 1938. Attached hereto is a copy of my letter of July 25, 1938, from the third paragraph to the end conclusively shows there had been lengthy periods of violation involving many thousands of dollars in penalty payment if a favorable award was made for the employes.

At the request of Mr. Bond, I had a lengthy interview on this matter at the time the arbitrary allowance to Roadmen was made in Chicago, however, since I object to verbal claims I shall not contend for what occurred in that case, but he will undoubtedly recall it concerned the South Chicago Yard and not the Whiting starting time.

Therefore, on the merit of the claim, time is claimed as specified in "Statement of Claim" in this case.

Carrier's Statement of Facts: Prior to July 27, 1934, the intra plant switching and the terminal work within the Standard Oil Company yard at its refinery at Whiting, Indiana, was performed by plant engines manned by crews in the employ of the Standard Oil Company. According to the best information available the industry worked a maximum of seven (7) regular engines daily and such additional extra engines as might be found necessary due to the volume of business. These engines were started at such times as the plant management required without regard to regularity or continuity.

On July 27, 1934, the Elgin, Joliet and Eastern Railway Company took over this service and by agreement with the representatives of the several classes of interested employes commenced to work in this yard with the understanding with its employes that provisions of Article 6 of the Yardmen's Agreement and similar agreements with other interested employes could not be adhered to, but that as the work progressed the starting time of the yard engines would be rearranged to conform as closely as possible with the starting times provided for in said agreements. Owing to plant operations some of these engines were

started at times at variance therewith until November 15, 1938, on which date all engines were started at the time specified in the schedule. This was done by a letter agreement with the General Chairman of the B. of R. T. dated October 28th, 1938, and with the distinct understanding with the representatives of the several classes of the interested employes that if after a ninety (90) day trial period it was found that such starting times did not result in efficient and economical operation or in satisfaction to the employes and to the industry that these representatives would meet with the Management and attempt to work out a schedule of starting times that would fit the requirements of the industry and satisfy as far as possible the interest of the employes.

Position of Carrier: Shortly before July 27th, 1934, the Executive Officers of the Elgin, Joliet and Eastern Railway Company, hereinafter called the "Carrier," were approached by Officials of the Standard Oil Company, hereinafter called the "Industry," and a proposal made
33 that the Carrier take over the plant switching, which under its tariffs it holds itself out to do, and also to perform the terminal work for all of the railroads serving the plant. There are four (4) railroads other than the Carrier serving this plant with their own rails, but in the interest of economy and efficiency it was desirable that one (1) railroad do all of the terminal work.

A conference was held with the representatives of the engineers, the firemen and the yardmen employed by the Carrier, on July 24th, 1934, and the situation discussed in all its details including the starting time. The performance of the plant switching by the Carrier was recognized as being desirable by both the Carrier and its employes, and it was understood at the outset that there could be no adherence to the general rules governing starting time, but that after the work had been handled for a sufficient time to determine what could be done, an effort would be made to conform as nearly as possible to the starting times provided for in Article 6 of our Yardmen's agreement and similar provisions in agreements with the other interested employes. This was done and during the period July 27, 1934, to November 15, 1938, many of the engines were started at the scheduled hours, or very nearly so. There were some engines, however, that because of plant operation were required at times during the day which made it

necessary to start them at other than the exast times provided for in Article 6 of the Yardmen's agreement. This was principally due to the necessity of taking care of the peak business.

Negotiations were carried on with the representatives of the employes during the period between July 27, 1934 and October 28, 1938, relative to the efforts being made to bring the starting time of these engines more closely in conformity with the general rules and in the latter part of 1936 the following complaint was submitted to your Honorable Board ex parte by the General Chairman of the B. of R. T. identified as Docket No. 3537—

"Complaint of employes that yard engines in the plant of the Standard Oil Company at Whiting, Indiana, are being started at times other than those provided in Article 6 of the Yardmen's Agreement."

This and several other cases filed by the B. of R. T., which were before the Board, were settled by a letter agreement, excerpts from which bearing on this particular case are quoted below:

"October 28th, 1938.

Mr. C. H. Williams,
General Chairman, Brotherhood of Railroad Trainmen,
603 Jackson Street,
Joliet, Illinois.

Dear Sir:

Since my letter of August 18th in which I tentatively proposed settlement of certain matters of grievance we have had further correspondence and conferences which have modified our decision in some cases. Therefore, in order that the whole matter be placed in concrete form I am outlining below our proposals to settle all of the cases except as otherwise specified.

Case No. 5—Labor Board docket No. 3537—Starting Time of Switch Engines in Whiting S. O. Yard.

Settled by agreement that the starting times, for a ninety day trial period commencing November 15th, 1938, shall be the times provided for in Article 6 of the Yardmen's Agreement instead of the starting times heretofore agreed upon and now being followed. If at the end of the ninety day trial period the Railway Company or its employes claim that the starting times as fixed in Article 6 do not result in efficient and economical operation and in

satisfaction to our employes and to the industry served, then representatives of the Railway Company and representatives of the Yardmen and representatives of the Engineers and representatives of the Firemen will sit down and work out a schedule of starting time best suited for meeting the special requirements of the industry.

* * * * * *

We have by this letter given you a complete resume of all of the claims which have not heretofore been disposed of, filed by you on behalf of the employees whom you represent and have proposed in this letter a very liberal disposition of all of the cases involved. The settlements proposed are predicated on a complete settlement and withdrawal of all cases now pending either before the Board, or under discussion with this office except Case No. 4, which if is understood will be left to a decision by the National Railroad Adjustment Board, and it is further understood that in the event settlements are accepted that the claims listed in this letter cover all claims of a similar nature, and that no other claims covering the same or like situations will be presented when such claims arise from causes occurring prior to the date of this settlement.

Your truly,

(Signed) S. M. Rogers,
President.

Accepted for the Yardmen: Oct. 31, 1938
(Signed) C. H. Williams,
General Chairman, B. of R. T.
(Signed) S. F. Johnson,
Secretary, B. of R. T."

* Note—The agreement referred to was a verbal agreement which the letter confirmed.

Accordingly, the Carrier and General Chairman Williams jointly notified the Board by letter to Secretary T. S. McFarland dated October 31, 1938 that these cases were settled and on the same date Secretary McFarland addressed a joint letter to Mr. A. F. Whitney, President B. of R. T. and Mr. S. M. Rogers, President of the Carrier, stating that these claims were removed from the Docket of the Board. A copy of this letter was sent to General Chairman Williams by Secretary McFarland.

The claim in dispute has no merit whatsoever and in presenting it to the Carrier, General Chairman Williams violated the following part of the aforesaid letter agree-

ment dated October 28th, 1938, executed by the Carrier and General Chairman Williams and Secretary Johnson of the B. of R. T.

"The settlements proposed are predicated on a complete settlement and withdrawal of all cases now pending either before the Board, or under discussion with this office except Case No. 4, which it is understood will be left to a decision by the National Railroad Adjustment Board, and it is further understood that in the event these settlements are accepted that the claims listed in this letter cover all claims of a similar natufe, and that no other claims covering the same or like situations will be presented when such claims arise from causes occurring prior to the date of this settlement." (Underscoring mine.)

34 The underscored wording specifically provides that the settlement accepted for the Yardmen by the General Chairman and Secretary of the B. of R. T. was a complete settlement of the complaint in Docket No. 3537 and that such acceptance covered not only the complaint in Docket No. 3537 but "all claims of a similar nature." In accepting the settlement, General Chairman Williams further agreed by the positive and unmistakable terms quoted above that—"no other claims covering the same or like situations will be presented when such claims arise from causes occurring prior to the date of this settlement." This clearly and definitely means that by his acceptance of the settlement, General Chairman Williams agreed that the Yardmen were not to present to the Carrier any claims incident to, connected with or growing out of the complaint in Docket No. 3537.

While, of course, the Carrier has not seen the ex parte submission of the employes, we assume General Chairman Williams will claim therein, as he did in a letter to the undersigned dated March 28, 1939, that there was no agreement made on July 24th, 1934 between the Carrier and the representatives of the several classes of employes interested, including Mr. L. A. Hyde, then General Chairman of the B. of R. T., which authorized the Carrier to start some of its engines in the industry at times other than those specified in our Yardmen's agreement. In effect, he stated in that letter that if such an agreement was made it was not made with his Committee, and because it was not in writing it could not bind the present Committee.

This, to say the least, is a very unusual position to take. We positively state that there was a verbal agreement made on July 24th, 1934 between the Carrier and the representatives of the several classes of employes interested which authorized the Carrier to start some of its engines in the Industry at times other than those specified in our Yardmen's agreement and that General Chairman Williams was aware of its existence and terms, which he acknowledged, by his acceptance of the terms of the letter agreement dated October 28, 1938. The existence of this verbal agreement is unquestionably substantiated by the following language in the aforesaid letter agreement signed by Messrs. Williams and Johnson.

"Settled by agreement that the starting times for a ninety day trial period commencing November 15th, 1938, shall be the times provided for in Article 6 of the Yardmen's Agreement instead of the starting times heretofore agreed upon and now being followed." (Underscoring mine.)

If it were not for the recognition of the aforesaid verbal agreement—

(a) It is obvious that Mr. Williams, or his predecessor would have presented the instant claim immediately after the expiration of the claimed thirty-day period mentioned in the "Note" below the "Statement of Claim" and not four and one-half years after the agreement was made, or

(b) He would have made the instant claim part of the claim covered by Docket No. 3537 and

(c) He would have taken exception to the provisions of the settlement reading "instead of the starting times heretofore agreed upon and now being followed."

General Chairman Williams does not even now contend that there was no agreement made waiving the provisions of Article 6 of the Yardmen's agreement. On the contrary he admits in the presentation of his case that there was such an agreement but claims that it expired on August 26, 1934.

At this point the Carrier wishes to state positively that there was not connected with the agreement of July 24, 1934, any restrictions as to the period during which the provisions of Article 6 of the Yardmen's Agreement, and similar provisions in the agreements with the engineers and firemen, would be waived. This thirty (30) day limitation now claimed was never mentioned in conversations

or correspondence regarding the subject of the starting time in the Industry until ovember 3, 1938, when Chairman Meade of the B. of L. F. & E. referred to it casually in a conversation with the Vice President of the Carrier, at which time the statement that there was any such restriction was promptly denied by the Vice President.

It is very significant that in all of the negotiations regarding the arrangement of the starting time which have been carried on from time to time during the past 4½ years, that there was never, until the claim referred to, which has been filed with the Board by the B. of L. F. & E. and covered by Docket No. 6788, any denial on the part of any of the Committees that there was an agreement waiving the starting time rule, or claim made that such an agreement was limited to a thirty (30) day—or any other specified period.

The subject of starting time in this yard has been one of correspondence and conference with the General Chairman of the B. of R. T., but until March 15, 1939, when a claim for time was presented to the General Manager of the Carrier, neither the present Chairman of the B. of R. T., nor his predecessor, with whom the agreement was actually made, has ever denied the existence of such an agreement or claimed that there was any time limit involved in it. As a matter of fact it would have been impossible for this Carrier to agree to a time limit when the work was taken over, because, as it explained to the representatives of the employes, it had no knowledge of how the work was performed in the plant and would not be able to make any definite statements with respect to changes in the method of operation until it had an opportunity to see what could be worked out. This referred particularly to the starting times, and while the Carrier did agree that it would, insofar as it might be practicable, start engines at the times specified in the agreement it said that there might have to be exceptions made.

It is not at all unusual to make exceptions to starting time in connection with industrial switching. The switching and terminal service in an industrial yard is entirely different from the switching service performed in a Carrier's yard where schedule times can usually be adhered to without loss of efficiency. In handling work for an Industry the requirements of the plant are paramount and the engines must be started and worked in harmony with

the plant operation. As illustrative of these exceptions attention is called to those in Article 6 applied to other plants served by the Carrier.

"Starting time of yard crews on one, two or three 8-hour shifts will be as follows:

7:00 A. M., 8:00 A. M. and 8:30 A. M.
3:00 P. M., and 4:00 P. M.
11:30 P. M., 12 midnight and 12:30 A. M.

except in hot metal and cinder, coke over, Buffington and Waukegan districts, in one, two or three shifts, starting time will be 6:30 A. M., 7:00 A. M., 7:30 A. M., and 8:00 A. M., 2:30 P. M., 3:00 P. M., 3:30 P. M., and 4:00 P. M.; and 10:30 P. M., 11:00 P. M., 11:30 P. M., and 12 o'clock midnight.

Starting time for Stockton engines will be 6:30 A. M., 1:30 P. M. and 8:30 P. M.

Starting time for yard crews handling ore at South Chicago will be 6:00 A. M. and 1:00 P. M.

Starting time for yard crews handling coal and ore at Gary will be 6:00 A. M. and 1:00 P. M.

Starting time for yard crews assigned to coal loading and unloading at East Joliet will be 6:30 A. M."

35 It will be noted from the above that many exceptions were made on account of conditions which had to be met.

After the work in this plant had been assumed by the Carrier a great many changes were made in the starting time of the engines and through the cooperation of the plant considerable progress was made, until effective November 15, 1938, it was agreed that for a trial period of ninety days, all of the engines would be started at the times specified in the agreements.

In view of the foregoing the filing of this claim is not only a violation of the verbal agreement made on July 24, 1934, with the representatives of the yardmen, the existence of which is acknowledged by the acceptance of the terms of the letter of settlement dated October 28, 1938, but is also a violation of the very terms of that letter because the letter itself constitutes an agreement that "no other claims covering the same or like situations will be presented when such claims arise from causes occurring prior to the date of this settlement." It is plain that this claim arises out of the cause complained of in the claim filed with the Board as Docket No. 3537, which

was withdrawn as a result of this settlement. Therefore, the Carrier respectfully requests that the claim be dismissed, but if further consideration is given to it the Carrier requests that oral hearing be granted and that it be given an opportunity to present witnesses.

All data submitted in support of the Carrier's position was presented to the employes and made a part of the particular question in dispute.

(Exhibits not reproduced.)

Findings: The First Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

The parties to said dispute were given due notice of hearing thereon.

The evidence shows that the parties to the agreement disposed of the claim here made by the letter of carrier dated October 28th, 1938, accepted by employes October 31, 1938.

Award.

Claim denied per Findings.

National Railroad Adjustment Board
By Order of First Division
Attest: (Sgd.) T. S. McFarland,
Secretary.

Dated at Chicago, Illinois, this 6th day of September, 1940.

36 And on, to wit, the 24th day of December, 1940, the Plaintiffs by their attorney and filed in the Clerk's office of said Court their certain Notice in words and figures following, to wit:

Filed Dec. 24, 1940.

37 IN THE DISTRICT COURT OF THE UNITED STATES.

(Caption—2341)

NOTICE.

To: Knapp, Allen and Cushing
208 South LaSalle Street,
Chicago, Illinois.

Please Take Notice that on Tuesday, December 24, A. D. 1940, in the forenoon or as soon thereafter as counsel may be heard, I shall appear before His Honor Judge John P. Barnes, in the room usually occupied by him as a courtroom, in the Federal Building, Chicago, Illinois, or in his absence before such other Judge as may be sitting in his place and stead, and shall then and there present a motion, a copy of which is herewith served upon you, and ask that an order be entered in accordance therewith.

At Which Time and Place you may appear if you so see fit.

John H. Cately,
Attorney for Plaintiffs.

Received a copy of the above and foregoing notice with motion attached, this 21st day of December, A. D. 1940, before the hour of 12:00 o'clock noon.

Knapp, Allen and Cushing.
Motion No.
Page No.

38 And on, to wit, the 24th day of December, 1940, came the Plaintiffs by their attorney and filed in the Clerk's office of said Court their certain Motion to Strike in words and figures following, to wit:

49 IN THE DISTRICT COURT OF THE UNITED STATES. Filed Dec. 24, 1940.

(Caption—2341)

MOTION TO STRIKE.

Now come the plaintiffs herein, by John H. Gately, their attorney, and move the court to strike the Motion to Dismiss filed herein by the defendant in the above entitled cause for the following reasons:

(1) That said Motion to Dismiss sets up new and additional evidentiary matter not covered by the complaint filed herein, namely, what amounts to a plea of release and also a plea of res adjudicata, both of which matters are properly pleadable under the rules of this court, namely, Rule 12, sub-paragraph (b) by a responsive pleading;

(2) That said Motion to Dismiss is also contrary to Rule 8 of the Rules of Civil Procedure of this court, which states that matters as set forth therein, shall be set forth in a pleading;

(3) That to properly hear the Motion to Dismiss as filed herein and any reply thereto, it would be neces-
40 sary for this court to hear evidence which cannot be done on a Motion to Dismiss.

Wherefore, your plaintiffs pray that the Motion to Dismiss filed herein, may be stricken and a rule entered upon said defendants to file their answer to the complaint filed herein within a short date to be fixed by the court, or that judgment may be entered herein in favor of plaintiffs.

John H. Gately,
Attorney for Plaintiffs, Harry M. Aldgrman, E. E. Beeeue, W. B. Brämer, et al.

41 And afterwards, to wit, on the 24th day of Decem-
ber, A. D. 1940, being one of the days of the regular December term of said Court, in the record of proceedings thereof, in said entitled, before the Honorable John P. Barnes, District Judge, appears the following entry, to wit:

Entered Dec. 24, 1940. 42 IN THE DISTRICT COURT OF THE UNITED STATES.

(Caption—2341)

Tuesday, December 24, 1940.

Present: Hon. John P. Barnes, District Judge.

This day come the Plaintiffs by their attorney and enter their motion to strike Defendant's motion to dismiss which motion and the Defendant's motion to dismiss are set for hearing January 13, 1941.

Filed Jan. 13, 1941. 43 And on, to wit, the 13th day of January, 1941, came the Defendant by its attorneys and filed in the Clerk's office of said Court its certain Motion for Summary Judgement in words and figures following, to wit:

44 IN THE DISTRICT COURT OF THE UNITED STATES.

(Caption—2341)

MOTION FOR SUMMARY JUDGMENT.

The defendant, Elgin, Joliet and Eastern Railway Company, a corporation, by Harry I. Allen and Paul R. Conaghan, its attorneys, hereby moves the Court to enter summary judgment for the defendant, and in support of said motion, in accordance with the provisions of Rule 56 (b) of the Rules of Civil Procedure, the defendant refers this Court to the affidavit of T. E. Bond heretofore filed in this Court, attached to the motion of the defendant to dismiss the complaint herein.

Harry I. Allen,
Paul R. Conaghan,
Attorneys for Elgin, Joliet and Eastern Railway Company, a corporation, defendant.
208 S. LaSalle Street, Chicago, Ill.

45 And on, to wit, the 29th day of January, 1941, came the Plaintiffs by their attorney and filed in the Clerk's office of said Court their certain Reply to Motion in words and figures following, to wit:

46 IN THE DISTRICT COURT OF THE UNITED STATES. Filed Jan. 29, 1941.

(Caption—2341)

REPLY TO MOTION SETTING UP PLEAS OF RES ADJUDICATA AND RELEASE ON A MOTION FOR A SUMMARY JUDGMENT.

Summary Judgment.

(1) A summary judgment should not be entered in this cause for either party because there are certain issues of fact involved herein that have been raised by the affidavits of the defendant and plaintiffs that should be tried by a jury;

(2) The letter under date of October 28, 1938, pleaded by the Defendant as a release in its motion, should not be considered as a release of the plaintiffs' individual claims against the Defendant for the following reasons:

(a) In order to be a valid release, there must be a proper subject matter, competent parties, a consent or meeting of the minds of the parties, and a valid con-
47 sideration. Plaintiffs' own exhibits demonstrate that one of the signers to the letter, C. H. Williams, did not understand the letter to be a release of the individual claims of the Plaintiffs herein, for immediately after the execution of said release, he filed what purported to be individual claims on behalf of the Plaintiffs herein, without authority, against the Defendant with the National Railroad Adjustment Board. It is also apparent that there was a total want of consideration. The affidavits also show that insofar as Williams is concerned, he was an incompetent party;

(b) The letter of October 28, 1938, upon examination, according to its own terms, cannot act as a valid release of the individual claims of the plaintiffs herein;

(c) C. H. Williams, as General Chairman of the Brotherhood of Railroad Trainmen, had no authority to present or compromise the individual claims of the plaintiffs. His authority was limited to prosecuting a complaint before the Board to compel the Defendant to comply with Article 6 of the agreement, by furnishing engines and work for the members of the Brotherhood at the times

specified in said "schedule" and the so-called release being a letter of October 28, 1938, was without consideration and therefore void.

(d) Officials of the Brotherhood of Railroad Trainmen, under the Constitution and rules, cannot release the claims of the individual members of the Union without specific authority so to do granted by the individual members themselves, nor can they submit to any compromise of any grievance without such a submission of which the Defendants had knowledge.

(3) The award of the National Railroad Adjustment Board cannot be considered as an adjudication of the
48 Plaintiffs' individual rights set up by a plea against the Plaintiffs herein because said Board was without jurisdiction of both of the parties and of the subject matter for the following reasons:

(a) The officials of the Brotherhood of Railroad Trainmen had no authority to present any individual claims of the Plaintiffs herein to the Defendant, nor to the National Railroad Adjustment Board, for consideration, because there had been no meeting of the Local Lodge authorizing the presentation of any grievances nor any forwarding of any authorization to the General Chairman, as required by the Constitution of the Brotherhood, of which the Defendant was aware;

(b) No notice was given to, nor received, by the Plaintiffs of the pendency of any hearing nor of the hearing held by the National Railroad Adjustment Board, under which the award pleaded herein was rendered;

(c) By the specific wording of the Statute under which said National Railroad Adjustment Board rendered its "award" pleaded herein, said award is not final nor binding on any of the parties thereto even though your Plaintiffs herein should be considered as having been proper parties to said proceeding because said Statute provides:

"Said award shall be final and binding upon both parties to the dispute, except insofar as they shall contain a money award."

(d) The Statute under which said award is pleaded, U. S. Code Annotated, Title 45, Paragraph 153, violates the due process clause, Fifth Amendment to the Federal Constitution, because in and by said Statute the defeated employee who is defeated before said Board has no right

of the review of any decision handed down by said
49 Board; but a defeated employer when the order on the award is sought to be enforced has a right of review in the Federal District Court, and the Appellate Court, and the United States Supreme Court;

(e) If it should be held that the National Railroad Adjustment Board acts merely as an arbitrator, then any decisions thereunder are void because it passes on matters and basis its decision and its opinion on law and fact which is contrary to public policy.

Wherefore, Plaintiffs herein move the court to overrule the Motion for summary judgment of the Defendant; and to hold that the letter dated October 28, 1938, is not a release of any claims of the plaintiffs herein, and that the award of the National Railroad Adjustment Board is either not a final adjudication as to the Plaintiffs herein; or that said award is void as to these Plaintiffs for lack of jurisdiction of the parties of the subject matter; or void because said Act under which award was entered is unconstitutional.

John H. Gately,
Attorney for Plaintiffs.

50 And on, to wit, the 29th day of January, 1941, came the Plaintiffs by their attorney and filed in the Clerk's office of said Court their certain Counter Affidavit in words and figures following, to wit: Filed Jan. 29, 1941.

51 IN THE DISTRICT COURT OF THE UNITED STATES.
(Caption—2341)

COUNTER AFFIDAVIT TO AFFIDAVIT IN SUPPORT OF MOTION TO DISMISS.

State of Illinois, } ss.
County of Cook, }

We, the undersigned, being severally first duly sworn on oaths depose and says that we are some of the plaintiffs in the above entitled cause and that we make this as a counter-affidavit for ourselves and the other plaintiffs herein to the affidavit filed by the defendant herein and state as follows:

1) That the Brotherhood of Railroad Trainmen, a duly licensed association of railroad employees throughout the

United States of America, hereinafter referred to as the B. of R. T. entered into a schedule or working agreement with the Elgin, Joliet & Eastern Railroad Company, a corporation, hereinafter referred to as The Company, on behalf of all of its members working for the Defendant
52 on any of its lines or yards throughout the system of the Defendant, said agreement to be effective January 1, 1927. Said agreement was to be—"in effect until April 1, 1928, and thereafter until thirty days notice shall have been given by either party of their desire to change or terminate the same or any part thereof", and signed by P. F. McManus as General Superintendent and approved by J. M. Rogers as Vice President, both of the Elgin, Joliet & Eastern Railroad Company, a corporation, and by Samuel E. Wilson, General Chairman and W. L. Wall, Secretary, both of the B. of R. T. That said agreement still stands in full force and effect and that no notice of the abrogation or cancellation thereof has been given by either party thereto.

2) That on about July 24, 1934, many of the Plaintiffs herein had been working for the Standard Oil Company of Indiana, a corporation, as yardmen in their yard, located at Whiting, Indiana, and designated as "The Whiting Yard".

3) That in the early part of July, 1934, Plaintiffs desired to join the B. of R. T. and were advised by the Standard Oil Company that they would not operate the yard, but would turn the same over to the Defendant company herein.

4) That the plaintiffs herein who were then working at "The Whiting Yard" joined the B. of R. T. and that thereafter by proper resolution they had their duly elected officials meet with the officials of the Company for the purpose of reaching an agreement as to working conditions, hours, rates of pay, et cetera.

5) That said officials reached an agreement with the Company. Said agreement being that they would work under the "schedule" then in force dated January 1, 1927, that had been previously obtained by the B. of R. T. with the Company, subject however, to a thirty day suspension of Article 6 of said agreement.

6) That thereafter said officials of the B. of R. T. then called a special meeting of the members of the B. of
53 R. T. who had been working in the "Whiting Yard" and submitted said agreement to them for their con-

sideration and approval. That the said members after discussion thereon, voted upon, and accepted said agreement, which included the thirty day suspension of Article 6 and ratified the terms thereof.

7) That thereafter notice of the action of said members in the acceptance of said agreement was forwarded to the Grand Lodge of the B. of R. T. in Cleveland, Ohio, in accordance with the Constitution and by-laws of the B. of R. T., and the Company was notified of the acceptance of said "schedule" by the duly authorized officials of the members of the B. of R. T. working the "Whiting Yard."

8) That said plaintiffs herein thereafter appeared at the "Whiting Yard" to begin working for the Company, That when they talked to the local officials of said Company in reference to employment and when told that they were employed by the Company, they were also advised that they were to work under the "schedule" of the Company with the B. of R. T. to which they agreed, and many of them were given a copy of said "schedule" by said officials of said Company at that time.

9) That after said "schedule", or agreement, was entered into between the members of the B. of R. T. working in the "Whiting Yard" and the Company, and after the plaintiffs herein had entered into the employment of said Company and performed the duties thereunder, the Company, on August 27, 1934, refused to abide by Article 6 of said agreement in that it refused to furnish your Plaintiffs with engines or engine crews when they reported for duty at the times specified in Article 6 of said "schedule" as aforesaid, although the Plaintiffs were ready, willing and able to perform their obligations thereunder.

10) That numerous complaints were made to the officials of the Defendant Company in accordance with the "schedule" and in accordance with the B. of R. T. Constitution and rules, but that said Defendant persisted in refusing to abide by terms of Article 6 of said "schedule".

11) That thereafter, a meeting of the plaintiffs at lodge 281 of the B. of R. T., of which your Plaintiffs were members, was held and the officials of said lodge were authorized to present to the officials of the Company, the Plaintiffs' grievance against that Company for the failure and refusal to abide by their obligations as set forth in Article 6, and upon said B. of R. T. officials inability to persuade the officials of the Company to conform to the provisions of Article 6, your plaintiffs were informed that the officials

of the B. of R. T. were unable to persuade the Company to agree to abide by Article 6. Said officials of the B. of R. T. were then authorized to file a complaint with the National Railroad Adjustment Board to enforce the terms thereof and compel the Defendant to perform thereunder.

12) That the Company also refused to enter a stipulation of facts to be submitted to the National Railroad Adjustment Board, and that therefore, said officials of the members submitted said complaint, to said board "ex parte" to endeavor to have said Board compel the Company to furnish your Plaintiffs with engines and the work as set forth in Article 6 of the "schedule".

13) That after the meeting authorizing the officials of the B. of R. T. to file the complaint for the enforcement of Article 6 of said "schedule" the Plaintiffs through their local foreman, filed time slips with the Company for the time due them by Defendant for its violation of Article 6.

14) That neither these affiants nor any of the Plaintiffs in this cause did at any time authorize or direct C. H. Williams, as General Chairman of the B. of R. T. nor S. F. Johnson, as Secretary of the B. of R. T., to present or file with the National Railroad Adjustment Board, any of their personal claims against the Company herein.

15) That the Plaintiffs herein never authorized C. H. Williams, S. F. Johnson, nor anyone to sign said letter, and had no knowledge of the signing of the letter of October 28, 1938, set out as Exhibit C of the Defendant's affidavit, until a few days after the decision of the National Railroad Adjustment Board which was rendered September 6, 1940, and that they at no time have ever received any consideration from the Defendant Company herein nor from C. H. Williams, for the waiving of any claims as set out in said letter.

16) That the authority of C. H. Williams as Chairman, and S. F. Johnson as Secretary, to act for these Plaintiffs and for and on behalf of Lodge 281 of the B. of R. T. and the members thereof under the Constitution rules and regulations of the B. of R. T. is specifically limited; that the Defendant herein had knowledge of the limitations set up in said Constitution, rules and regulations, the pertinent parts thereof being attached hereto as Exhibit A.

17) That the Plaintiffs herein were not notified of any hearing, had no knowledge of any hearing, nor were they present at any hearing, wherein any adjudication of any

of their personal claims was to be passed on by the National Railroad Adjustment Board.

18) That your Affiants state that they have recently been informed that C. H. Williams was notified to
56 bring to the hearing of the National Railroad Adjustment Board, ten or fifteen of the Plaintiffs members hereof.

19) That said Williams and Johnson had no authority, express nor implied, from any of the Plaintiffs herein, to waive any claims of your Plaintiffs as set forth in the letter of October 28, 1938.

20) That C. H. Williams and S. F. Johnson failed to notify your Plaintiffs as members of Lodge 281 of the B. of R. T., at any time, of their "settlement of claims" as set forth in a letter of October 28, 1938.

21) That the Brotherhood of Firemen and Enginemen had also filed a complaint with the National Railroad Adjustment Board growing out of the same grievance and that the facts in their claim were identical with the facts under which the claim filed by C. H. Williams, purportedly in the Plaintiffs' behalf, and that on the same date that the award was rendered denying C. H. Williams' purported claim for Plaintiffs herein, an award was entered by the National Railroad Adjustment Board in favor of the Brotherhood of Firemen and Enginemen, a copy of said award being attached hereto as Exhibit B.

Further Deponents Sayeth Not.

L. S. Christine,
F. E. Beccue,
J. C. Newman,
G. W. Burley.

Individually subscribed and sworn to before me, a Notary Public, this 27th day of January, A. D. 1941.

Hyman M. Greenstein,
(Seal) *Notary Public.*

57 EXHIBIT A.

Constitution and General Rules of the Brotherhood of Railroad Trainmen.

Officers and Duties of General Grievance Committee and Board of Adjustment.

Rule No. 3.

A General Grievance Committee shall not revise or change a general or system wage schedule or agreement unless authorized to do so by a majority vote of the lodges on the system or by a majority vote of the membership on the system if such vote is deemed advisable by the general committee, and it may, when authorized so to do, make and enter into contracts or agreement not inconsistent with the law and policy of the Brotherhood, with the railroad, the employes of which it represents, concerning rates of pay and working conditions.

• • • • •

Failure of Local Committee to Adjust

Rule No. 7.

When the local chairman or grievance committee fails satisfactorily to adjust any grievance referred to it, as provided in the foregoing rules, and if the lodge so orders it, the secretary of the lodge shall immediately send a certified copy of the grievance to the chairman of the general grievance committee, and a duplicate copy of the grievance to the President of the Brotherhood. It shall be the duty of the chairman of the general grievance committee, on receipt of certified copy of grievance, to appoint a time for the consideration of the grievance, and to summon the secretary of the general grievance committee, and the chairman of the local grievance committee of the lodge where the grievance exists, to meet with him at an appointed time, in the city where the headquarters of the general superintendent or the general manager of the railroad, for that part of the system on which the grievance exists, is located. A committee thus constituted shall have power to alter, amend, add to or strike out or with the approval of the President refer to the Legislative Department of

the Brotherhood any part or all of any complaint or claim submitted to the committee, subject to appeal to the entire General Committee and or Board of Appeals. A general grievance Committee may authorize their chairman to handle all grievances received from local lodges with the management for settlement, failing in this, he will so report to the Secretary of the General Grievance Committee and the Chairman of the Local Lodge where the grievance exists to determine further handling.

Notification of Action on Grievances

Rule No. 8½.

Any Local, Sub or General Committee or Board of Adjustment making decision, closing out cases, accepting
58 settlements for grievances referred to them, will within thirty days from date of such action notify the Secretary of the lodge where grievance originated and the member or members filing grievance of such action and the notification to be made in writing. If the seniority of a member of some other lodge on the system is affected by such decision the member affected and the secretary of his lodge will be notified in writing.

* * * * *

General Rule 5.

All grievances must be handled by the regular local grievance committee before being referred to the general grievance committee for adjustment. Special committees cannot be appointed by the lodge for the purpose of presenting grievances because it may be thought the members of the regular committee do not favor the matter in hand.

59 EXHIBIT B.

Award No. 5049
Docket No. 6788

National Railroad Adjustment Board

First Division

The First Division consisted of the regular members and in addition Referee Paul W. Richards when award was rendered.

Parties to Dispute:

Brotherhood of Locomotive Firemen and Enginemen

Elgin, Joliet and Eastern Railway Company.

Statement of Claim: Claim for an additional day at time and one-half, at the regular daily rate, from August 26th, 1934, until the Company complies with the schedule starting time rule, for each and every fireman working in the Standard Oil Plant, Whiting, Indiana, for each and every day he was obliged to start work, at other than the schedule starting time. Claim is further made that any analogous violations of starting time rules which may have occurred subsequent to August 26th, 1934, shall be adjusted in accordance with the above claim.

Employes' Statement of Facts: On July 24th, 1934, the V. Pres. of the E. J. & E. R. R., held a meeting with the Engineers', Firemen's and Trainmen's Committees to arrange for the handling of the new work being taken over, namely; the industrial switching in the Standard Oil Plant, Whiting, Indiana. At this meeting it was verbally agreed by all concerned, to allow the Company thirty days from July 27th, 1934, in which to comply with the starting time rules of the several schedules. On July 27th, 1934, the E. J. & E. Ry. did take over the above mentioned switcher, but to date they have not complied with the Firemen's schedule starting time rule. The B. of L. F. & E. starting time rule reads in part;

Article (10). Par. (A), regularly assigned yard crews will each have a fixed starting time, and the starting time of a crew will not be changed without at least forty-eight hours advance notice. Present practice as to the handling of the transfer crews is not affected by the foregoing.

Par. (B), Starting time of switch engines on one, two or

three eight hour shifts will be as follows: 7:00 A. M., 8:00 A. M., and 8:30 A. M.; 3:00 P. M. and 4:00 P. M.; 11:00 P. M., 12 midnight and 12:30 A. M.

On July 27th, 1934, there were eight yard engines working on the following starting times;

One engine at	6:30 A. M.	One engine at	4:30 P. M.
" " "	9:30 A. M.	" " "	7:30 P. M.
" " "	10:30 A. M.	" " "	10:30 P. M.
" " "	3:30 P. M.	" " "	11:30 P. M.

The only engine that was being started on the schedule starting time was, the 11:00 P. M. engine. Some of the engines starting times were changed between July 27th, 1934, and the present. Additional yard engines have been added, making a total of twelve engines now working.

This case was handled in the usual manner, including conferences with the Pres. of the railway. The interested parties being unable to agree on a statement of facts, the employes herewith present the case ex parte and desire oral hearing.

Position of Employes: An effort was made to adjust this case with Mr. J. E. Rielly, General Supt., on Oct. 10th, 1934, without satisfaction. On Jan. 2nd, 1935, the case was handled with Mr. S. M. Rogers, the Pres. of our railroad, without satisfaction. On several subsequent dates this case was handled, but the Company would not comply with the schedule starting time rules. On Dec. 6th, 1938, we requested Mr. P. E. Bond, V. Pres., of our railroad, to join us in submitting this case to the N. R. A. B., Div. 1. Mr. Bond could not agree with us on the statement of facts, therefore, we are obliged to submit ex parte.

We maintain, the only time the Company was privileged to start an engine off the regular starting time was, during the thirty day period from July 27th, 1934, to Aug. 26th, 1934, both dates inclusive. You will note there is around the clock service in this plant. You will also note, the starting times are specific and do not provide different starting times, where two shifts are worked in, or not in continuous service, nor is an independent assignment given a different starting time.

The employes wish to cite, in further support of their claim, N. R. A. B. Div. 1, Awards 916, 917, 1232, 1233, 1247, 2947, 3065, 3072, and 3096.

Carrier's Statement of Facts: Prior to July 27th, 1934, the intra plant switching and terminal work within the

Standard Oil Company Yard at its refinery at Whiting, Indiana, was performed by plant engines manned by crews in the employ of the Standard Oil Company. According to the best information available the industry worked a maximum of seven (7) regular engines daily and such additional extra engines as might be found necessary because of the volume of business. These engines were started at such times as the plant management required without regard to regularity or continuity.

On July 27th, 1934, the Elgin, Joliet and Eastern Railway Company took over this service and subsequent thereto, rearranged the starting time of the yard engines to conform as closely as possible with the starting times provided for in Article 10 of the Firemen's Agreement, but, owing to plant operations some of the engines were started at times at variance therewith until November 15th, 1938, on which date all engines were started at the times specified in the schedule, but with the distinct understanding with the representatives of the several classes of interested employes that if after a ninety (90) day trial period it was found that such starting times did not result in efficient and economical operation or in satisfaction to our employes and to the industry that these representatives would meet with the Management and work out a schedule of starting times that would fit the requirements of the industry and satisfy as far as possible the interest of the employes.

Position of Carrier: Shortly before July 27th, 1934, the Executive Officers of the Elgin, Joliet and Eastern Railway Company, hereinafter called the "Carrier," were approached by Officials of the Standard Oil Company, hereinafter called the "Industry," and a proposal made that the Carrier take over the plant switching, which under its tariffs it holds itself out to do, and also to perform the terminal work for all of the railroads serving the plant. There are four (4) railroads other than the Carrier serving this plant with their own rails, but in the interest of economy and efficiency it was desirable that one (1) railroad do all of the terminal work.

A conference was held with the representatives of the engineers, the firemen and the yardmen employed by the Carrier, on July 24th, 1934, and the situation discussed
60 in all its details including the starting time. The performance of the plant switching by the Carrier was recognized as being desirable by both the Carrier and its employes, and it was understood at the outset that there

could be no adherence to the general rules governing starting time, but that after the work had been handled for a sufficient time to determine what could be done, an effort would be made to conform as nearly as possible to the starting times provided for in our agreement. This has been done and during the period July 27, 1934, to November 15, 1938, many of the engines were started at the scheduled hours, or very nearly so. There were some engines, however, that were required at times during the day which made it undesirable to start them at the exact time provided for in Article 10 of the Firemen's Agreement. This was due to the necessity of taking care of the peak business.

The understanding reached at the conference on July 24, 1934, is outlined in detail in a letter from the Vice President of the Carrier to General Chairman Meade, representing the Firemen, dated November 16, 1938 (copy of which is attached hereto as Carrier's Exhibit "A" and made a part hereof) and is in response to a request from Mr. Meade (Carrier's Exhibits "B" and "C") to join his organization in presenting the subject of this controversy in joint submission to your Honorable Board. Refusal of the Carrier to join in submitting this case was because the "facts" as presented in the proposed submission were not correct.

In the proposed Joint Statement of Facts the statement was made that—"At this meeting (referring to the meeting of July 24th, 1934.) it was verbally agreed by all concerned to allow the Company thirty (30) days from July 27th, 1934, to comply with the starting time of the several schedules." At the conference referred to there was no such agreement, or understanding. In fact the thirty (30) day period had never been mentioned in correspondence or conferences until at a meeting between Carrier's Vice President and Mr. Meade on November 3rd, 1938, where this case and other matters were discussed, Mr. Meade referred to the thirty (30) day time limit, and at this meeting, (November 3rd, 1938) as confirmed in the Vice President's letter dated November 16th, 1938, (Carrier's Exhibit "A") it was denied by the Carrier that there ever was any such understanding with respect to a definite time limit.

Article 10 of the Firemen's Agreement, which the complainant seeks to have applied, provides for the same starting time as Article 1 of our Engineers' Agreement and Article 6 of our Yardmen's Agreement, and was agreed

upon effective as of February 15th, 1923,—more than eleven (11) years before the switching operation of the Industry Plant was undertaken by the Carrier. Had the Carrier been doing the work at the Industry's plant at the time Article 10 was agreed upon, undoubtedly exceptions thereto would have been made to cover the conditions existing at this plant the same as were agreed to in other cases where circumstances and conditions existed which were recognized as warranting different starting times. For example, Article 10 of the Firemen's Agreement provides in part as follows:

"Starting time of switch engines on one, two or three 8-hour shifts will be as follows:

7:00 A. M., 8:00 A. M. and 8:30 A. M.
3:00 P. M., and 4:00 P. M.
11:00 P. M., 12 midnight and 12:30 A. M.

except in hot metal and cinder, coke oven, Buffington and Waukegan districts, in one, two or three shifts, starting time will be 6:30 A. M., 7:00 A. M., 7:30 A. M., and 8:00 A. M., 2:30 P. M., 3:00 P. M., 3:30 P. M. and 4:00 P. M.; and 10:30 P. M., 11:00 P. M., 11:30 P. M., and 12 o'clock midnight.

Starting time for Stockton engines will be 6:30 A. M., 1:30 P. M. and 8:30 P. M.

Starting time for switch engines handling ore at South Chicago will be 6:30 A. M. and 1:00 P. M.

Starting time for switch engines handling coal and ore at Gary will be 6:00 A. M. and 1:00 P. M.

Starting time for engines assigned to coal unloading jobs at East Joliet will be 6:30 A. M."

It will be noted from the above that many exceptions were made on account of conditions which had to be met.

As evidence that not only were there exceptions with respect to the starting time rule agreed upon in the taking over by the Carrier of the work formerly performed by the Industry, but other departures from the schedule were made by agreement. For example—some of the employes of the Industry handling the engines were, at the request of the General Chairman of the B. of L. F. & E., taken into the employ of the Carrier as firemen, hostlers, cinder pit men, etc., with prior rights in the Industry's yard but without system rights. The firemen of the Carrier agreeing through their representatives not to displace the men employed as firemen, who were taken over from the Indus-

try by the Carrier, and on the other hand, the men so taken over acquired no seniority rights at any other point on the System, this being an exception to Article 14 of the Firemen's Schedule which reads—

"System rights shall govern firemen on the Elgin, Joliet and Eastern Railway. This means that firemen will be allowed to make application for all vacancies on the System."

and also constitutes an exception to Article 33 of the Firemen's Schedule—which provides in Paragraph (A) thereof—

"In case of reduction in force, unless otherwise provided, fireman will be given the privilege of taking youngest man's engine in any class of service on any division or sub-division, except regular assigned runs, or pools, where oldest men will be given the preference to runs."

The switching and terminal service in an industrial yard is entirely different from the switching service performed in a Carrier's yard where scheduled times usually can be adhered to without loss of efficiency. In handling work for an Industry the requirements of the plant are paramount and the engines must be started and worked in harmony with the plant operation.

The Officials of the Industry cooperated with the Carrier in its efforts to plan the work so that regular starting times, as nearly as possible conforming with out agreements, could be established, and as stated many of the engines were started either on the exact hour prescribed therein or nearly so. But the representatives of the Firemen and the Yardmen still insisted that further changes could be made in the handling of the work, so in order that the Carrier might have the benefit of a considered opinion, the Management suggested that representatives of the Engineers, Firemen and Yardmen, together with Operating Officials of the Carrier, make a study of the situation and submit such recommendation as to changes which in their opinion could be put in force without interfering with the operation of the Industry, it being recognized by all that this is a highly competitive situation and that the necessity of satisfying the plant must be borne in mind.

The suggestion that a study be made of the situation was made at conferences with representatives of the Yardmen and Firemen when this subject was brought up, and on

May 11, 1935, a letter was addressed to Mr. Meade, General Chairman of the Firemen's Committee and Mr. L. A. Hyde, then General Chairman of the Yardmen's Committee, suggesting a joint conference with their Committees and the Committee representing the Engineers. This letter was never replied to, nor was the subject again mentioned until it was brought up at a conference between the Carrier and the Committees representing the Yardmen and
61 Firemen on March 19th and 20, 1936, during the proceedings of which some mention was made of the subject although not on the docket of subjects to be considered at the meeting. It was discussed in an informal manner and again the suggestion was made that a study should be entered into and proposal for any changes be submitted. The only action which was ever taken on this suggestion was a conference held at the Industry's plant on October 22nd, 1936 between representatives of the interested employes and the Operating Officials of the Carrier, but no concrete suggestions were forthcoming from the employes.

In order that the experiment might be given a full and fair trial the Carrier agreed on October 28th, 1938, with our employes to start all engines in the Industry's plant, commencing November 15th, 1938, at the times provided for in the agreements with the several classes of interested employes. This was done with the understanding that if at the end of a ninety (90) day trial period the Carrier, or its employes claim that the starting time provided for in said agreements do not result in efficient and economical operation and in satisfaction to our employes and to the Industry served, then the representatives of the Carrier, representatives of the Firemen, representatives of the Engineers and representatives of the Yardmen will meet with the Carrier and work out a schedule of starting times best suited for meeting the special requirements of the Industry. This understanding was arrived at through correspondence and conferences with the Yardmen—their representatives having urged that such a trial be made, and by telephone conversation with General Chairman of the Firemen and General Chairman of the Engineers. As having a very direct bearing on the understanding of the representatives of the employees regarding the starting time of engines prior to November 15th, 1938, the following is quoted from the letter agreement covering this, and other

subjects, written October 28th, 1938, by President Rogers of the Carrier to General Chairman Williams of the B. of R. T. representing the Yardmen and accepted by him for the Yardmen as of October 31, 1938.

Case No. 5—Labor Board Docket No. 3537—Starting time of switch engines in Whiting S. O. Yard."

"Settled by agreement that the starting times, for a ninety day trial period commencing November 15th, 1938, shall be the time provided for in Article 6 of the Yardmen's Agreement instead of the starting times heretofore agreed upon and now being followed. If at the end of the ninety day trial period the Railway Company or its employes claim that the starting times as fixed in Article 6 do not result of efficient and economical operation and in satisfaction to our employes and to the industry served, then representatives of the Railway Company and representatives of the Yardmen, and representatives of the Engineers and representatives of the Firemen will sit down and work out a schedule of starting time best suited for meeting the special requirements of the industry."

As a result of this agreement this case was withdrawn from the Board by a letter dated October 31st, 1938, to Secretary McFarland, signed jointly by President Rogers and General Chairman Williams of the Yardmen. Receipt of this letter was acknowledged by Secretary McFarland of the National Railroad Adjustment Board, First Division, on the same day, October 31st, 1938. This complaint of the Yardmen is referred to not because it is claimed that any agreement with the Yardmen would be binding upon the Firemen, but because is distinctly sets forth the understanding of both parties of the situation which existed prior to November 15th, 1936, and in the case filed by the Yardment there is no contention that such an understanding was not in force but only a request for an order from the Board requiring the Carrier for the future to start engines as provided in the schedule. An amicable agreement having been reached with the Yardmen with respect to a trial period, there was no necessity for the continuance of the case. The meeting on July 24th, 1934, having been a joint conference attended by representatives of the Firemen, Engineers and Yardmen the understanding of all must have been alike.

There was no violation of Article 10 of the Firemen's

Agreement because the waiver of the provisions of this Article was specifically agreed to by representatives of the Firemen, and while there were some departures from the starting time of yard engines provided in the Article the situation was thoroughly discussed and was understood by all interested.

The Carrier's submission covers that portion of the claim which refers to an additional day at time and one-half at the regular daily rate from August 26th, 1934, for firemen employed in the Standard Oil Plant at Whiting, Indiana, but it has no knowledge of what is meant by the concluding paragraph of the Statement of Claim, which reads—

"Claim is further made that any analogous violations of starting time rules which may have occurred subsequent to August 26th, 1934, shall be adjusted in accordance with the above claim."

Therefore, if consideration is to be given to that portion of the Statement of Claim, the Carrier insists that it must have further and more detailed information as to just what is meant by—"analogous violations of starting time rules."

The Carrier respectfully requests that this claim be denied.

Oral hearing is requested and an opportunity to present witnesses.

All data submitted in support of the Carrier's position was presented to the employes and made a part of the particular question in dispute.

(Exhibits not reproduced.)

Findings: The First Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

The parties to said dispute were given due notice of hearing thereon.

The record shows instances in which claimants were required to start work at hours other than those agreed upon in Article 10 (B). This constituted a violation of said article. In each instance the claimant is entitled to an adjustment of compensation as though he had in fact

been started to work not later than the next preceding hour fixed in Article 10 (B) for starting work.

Award

Claim disposed of per Findings.

National Railroad Adjustment Board,
By Order of First Division.
Attest: (Sgn.) T. S. McFarland,
Secretary.

Dated at Chicago, Illinois, this 6th day of September, 1940.

62 And on, to wit, the 6th day of February, 1941, came the Defendant by its attorneys and filed in the Clerk's office of said Court its certain Memorandum of Reply to Plaintiffs' motion to Strike, etc. in words and figures following, to wit: Filed Feb. 6, 1941.

63 In the District Court of the United States.

(Caption—2341)

MEMORANDUM OF REPLY TO: I. PLAINTIFFS' MOTION TO STRIKE; II. COUNTER-AFFIDAVIT OF PLAINTIFFS; III. PLAINTIFFS' ANSWER RELATING TO "RES ADJUDICATA AND RELEASE" SET FORTH IN DEFENDANT'S MOTIONS; IV. MEMORANDUM BRIEF IN ANSWER TO DEFENDANT'S MOTIONS TO DISMISS AND FOR SUMMARY JUDGMENT.

In this reply defendant will consider the various procedural and substantive matters submitted to this Court for decision in the order as hereinabove set forth as subdivisions to the title of this memorandum.

I.

Reply to Plaintiffs' Motion to Strike.

On December 24, 1940, plaintiffs filed a motion to strike defendant's motion to dismiss the complaint and the affi-

davit of the defendant in support of its motion because
64 the motion to dismiss set forth additional evidentiary matters not alleged in the complaint. The plaintiffs stated in their motion to strike that these evidentiary matters should be set forth by the defendant in a responsive pleading and not in an affidavit in support of a motion to dismiss. Subsequently, the defendant filed a motion for summary judgment and in support thereof relied upon the facts set forth in the affidavit in support of defendant's motion to dismiss. When the matters came for hearing before this Court on January 13, 1941, this Court entered a rule upon the plaintiffs to file counter-affidavits.

71 II.

Reply to Counter-Affidavit of Plaintiffs.

Four of the twenty-three plaintiffs subscribed their names to the counter-affidavit which they stated was made "for ourselves and the other plaintiffs." We respectfully submit that an individual plaintiff cannot make an affidavit for another individual plaintiff in a case which seeks to impose a liability for each individual plaintiff against the defendant.

The facts set forth in the counter-affidavit, even if true, which the defendant does not admit, do not present triable issues of fact. All of the facts set forth in the defendant's affidavit and the exhibits attached thereto are expressly admitted by the plaintiffs. The only substantive question presented to this Court for determination is whether the facts set forth in the affidavit of the defendant and the exhibits, when considered with the facts set forth in the plaintiffs' affidavit, present a question of law upon which this Court shall render judgment for the defendant.

The facts set forth in the plaintiffs' counter-affidavit are immaterial facts and show clearly that there is no genuine factual issue.

The counter-affidavit admits (Paragraph 11) that the officials of the local lodge of the Brotherhood of Railroad Trainmen of which the plaintiffs were members "were
72 authorized to present to the officials of the company, the plaintiffs' grievance against that company for the failure and refusal to abide by their obligations as set forth in Article 6" * *." Thereafter, the affidavit states

the officials of the B. of R. T. were then authorized to file a complaint with the National Railroad Adjustment Board to enforce the terms thereof and compel the defendant to perform thereunder."

Pursuant to this express authority, as shown by the counter-affidavit of the four plaintiffs, the General Chairman of the Grievance Committee of the Brotherhood of Railroad Trainmen, the designated representative of the plaintiffs for collective bargaining purposes, filed the first complaint before the National Railroad Adjustment Board on November 23, 1936, as shown by Exhibit "A" attached to defendant's affidavit in support of its motion to dismiss. This complaint on November 23, 1936, was assigned Docket No. 3537 by the Adjustment Board. (Exhibit "B" attached to defendant's affidavit.)

Subsequently, on October 31, 1938, the Grievance Committee of the Brotherhood of Railroad Trainmen and the President of the defendant railway company compromised this claim. This compromise was made in accordance with the duty imposed upon the carrier and the designated representative of its employees by the provisions of the Railway Labor Act (45 U. S. C. A. § 152, Paragraphs First and Second) requiring the parties "to make and maintain agreements concerning rates of pay, rules, and working conditions and to settle all disputes, whether
73 arising out of the application of such agreements or otherwise * * *." The signatures of the designated representatives of the employees are set forth on page 8 of Exhibit "C" attached to the affidavit filed by the defendant in support of its motion to dismiss. The counter-affidavit of the plaintiffs admits the execution of this document by the Chairman and Secretary of the Grievance Committee of the Brotherhood. This compromise agreement was not intended to be a partial settlement. The compromise agreement expressly provided otherwise. The intention of the parties as expressed in the agreement is clear and unambiguous. We repeat the final paragraph of the compromise agreement:

"We have by this letter given you a complete resume of all of the claims which have not heretofore been disposed of, filed by you on behalf of the employes whom you represent and have proposed in this letter a very liberal disposition of all of the cases involved. The settlements proposed are predicated on a complete settlement and with-

drawal of all cases now pending either before the Board, or under discussion with this office except Case No. 4, which it is understood will be left to a decision by the National Railroad Adjustment Board, and it is further understood that in the event these settlements are accepted that the claims listed in this letter cover all claims of a similar nature, and that no other claims covering the same or like situations will be presented when such claims arise from causes occurring prior to the date of this settlement."

This letter of compromise dated October 28, 1938, and accepted by the officials of the Brotherhood on October 31, 1938, is a typical example of collective bargaining as practiced daily throughout the United States by rail-
74 roads and designated representatives of employees.

In this letter (Exhibit "C" attached to the affidavit filed by the defendant in support of its motion to dismiss) disposition was made of thirty-eight cases, some of which were pending before the Adjustment Board and some of which were not filed by the Brotherhood before the Adjustment Board. All cases related to rates of pay, rules and working conditions of employees of the defendant and cases numbered 8, 9, 10, 11, 13, 14, 15, 16, 17, 23, 24, 36, 38, 39, 40, 41, 42, 44, 45, 50 and 54 (a), (b), (c) and (d) related to time claims for the payment of money varying from the amount of ~~$7.94 to~~ some individuals to the amount of $951.30 to another individual (Case 17). More than seventy-two individuals, employees of the defendant, received money or time claims as a result of this compromise agreement executed by the officials of the Brotherhood on October 31, 1938. Included among the individuals who were seeking money from defendant at this time were H. M. Alderman (Case 43), J. M. Harr (Case 43), J. Harr (Case 45), H. Alderman (Case 50), and T. J. Murray (Case 50), plaintiffs herein.

After the execution of this compromise agreement the General Chairman of the Grievance Committee of the Brotherhood of Railroad Trainmen executed a letter dated October 31, 1938, addressed to the Adjustment Board (Defendant's Exhibit "D" attached to the affidavit in support of its motion to dismiss) advising that "The following cases have been settled and we, therefore, jointly

request that they be withdrawn from the Docket of the Board. * * * National Railroad Adjustment Board Docket No. 3537. Complaint of employees that yard engines
75 in S. O. Company plant are being started at times other than those provided in Article 6 of the Yardmen's Agreement. * * *." That letter (Exhibit "D") also is a typical example of collective bargaining as daily practiced throughout the United States by carriers and designated representatives of employees. This collective bargaining, practiced for many years by the defendant and the designated representatives of the employees, is required by the Railway Labor Act of 1934.

77 The plaintiffs and the defendant admit that the Brotherhood of Railroad Trainmen is the designated representative of the plaintiffs within the meaning of the Railway Labor Act. The four plaintiffs who executed the counter-affidavit admit that the "officials of the B. of R. T. were then authorized to file a complaint with the National Railroad Adjustment Board" to enforce the provisions of Article 6 of the agreement of the defendant with its employees concerning rules, rates of pay and working conditions. With that authorization inheres the power to compromise.

The contentions made by the designated representatives of the employees in the complaint filed before the Adjustment Board on November 23, 1936, were not adverse to the plaintiffs. The contentions made prior to the compromise settlement executed by the Brotherhood officials on October 31, 1938, (defendant's Exhibit "C" attached to the affidavit filed in support of defendant's motion to dismiss) were not adverse to the plaintiffs. The contentions of the Brotherhood officials sought to benefit the plaintiffs in the case at bar. Any order entered by the Board finding that defendant had violated Article 6 of its agreement would have been a precedent for future orders of money claims.

79 The exhibits attached to the affidavit filed by the defendant in support of its motion to dismiss and incorporated by reference in its motion for summary judgment (Exhibits "A" to "F" inclusive) show collective bargaining with the General Committee of the Brotherhood of Railroad Trainmen, the designated representatives of the plaintiffs, during the period beginning in 1934 and ending in 1940. The affidavit of the four plaintiffs,

if given substantive legal effect, would require the defendant to cease collective bargaining.

81 That portion of Rule No. 5 quoted in Exhibit "A" attached to the plaintiffs' counter-affidavit does not apply to the compromise settlement executed by the Brotherhood officials on October 31, 1938. Clearly, it applies to an agreement relating to rules, rates of pay and working conditions. Such an agreement had been made in the case at bar. The plaintiffs predicate liability on an alleged violation of Article 6 of that agreement.

Rule No. 7 quoted in Exhibit "A" provides that the Grievance Committee "shall have power to alter, amend, add to or strike out * * * any part or all of any complaint or claim submitted to the committee * * * A general grievance committee may authorize their chairman to handle all grievances received from local lodges with the management for settlement. * * *" Such broad powers, granted to the Grievance Committee by Rule No. 7 permit the Committee to make an effective settlement of the dispute

82 regarding Article 6 in the case at bar. That settlement was executed by the Committee on October 31, 1938.

Rule No. 8½ quoted by the plaintiffs in Exhibit "A" attached to the counter-affidavit has no material relation to the case at bar. In like manner, general Rule No. 5, partially quoted in the same exhibit, has no material relation to the case at bar for the reason that the plaintiffs admit in their counter-affidavit that the officials of the Brotherhood "were then authorized to file a complaint" before the Board and to "enforce the terms" of Article 6.

The plaintiffs omitted to quote in Exhibit "A" attached to their counter-affidavit that portion of Rule No. 10 which provides:

"Whatever action may be taken by the general grievance committee * * * shall be law to the lodges on that road until the next meeting of the board of appeals, and if any member refuses to vote or abide by the action of such general grievance committee or board of adjustment he shall be expelled from the Brotherhood for violation of obligation."

The remainder of Rule No. 10 provides an appeal for any member of the Brotherhood who is not satisfied with the action of the Committee. Whatever action the plaintiffs in the case at bar may have for the alleged violation of rules of the Brotherhood should be taken before the various tribunals existing for that purpose created by the

Brotherhood of Railroad Trainmen. This Court lacks jurisdiction.

83 For the convenience of the Court there is attached hereto as defendant's Exhibit "G," a document which counsel for the defendant are informed and believe, and so state the fact to be, is a copy of the "Constitution and General Rules of the Brotherhood of Railroad Trainmen" amended 1931, and in force and effect at the time of the settlement agreement executed October 31, 1938. There is also attached hereto as defendant's Exhibit "H," a copy of the agreement between the defendant and its yardmen relating to rules and rates of pay, effective January 1, 1927, containing Article 6, for the alleged violation of which plaintiffs predicate liability.

The counter-affidavit of four of the twenty-three plaintiffs, in Paragraph 21 refers to an award made by the National Railroad Adjustment Board on September 6, 1940, Docket No. 6788, in the case of *Brotherhood of Locomotive Firemen and Enginemen v. Elgin, Joliet and Eastern Railway Company.* Obviously, that case refers

84 to a different "craft or class" than the Brotherhood of Railroad Trainmen. The counter-affidavit of the four plaintiffs (Paragraph 21) states "that the facts in their claim were identical with the facts under which the claim filed by C. H. Williams * * *". The counter-affidavit seeks to impress the Court that the facts in the Brotherhood of Locomotive Firemen and Enginemen case decided by the Adjustment Board were the same as the facts in the Brotherhood of Railroad Trainmen case decided by the Adjustment Board. There is obvious error, if such was the intent.

In the Brotherhood of Locomotive Firemen and Enginemen case, Docket No. 6788 (Exhibit "B" attached to the plaintiff's counter-affidavit) there was no negotiated compromise agreement. There was no document similar to the negotiated compromise agreement in the case at bar executed by the officials of the Brotherhood on October 31, 1938.

85 IV.

REPLY TO PLAINTIFFS' MEMORANDUM BRIEF IN ANSWER TO DEFENDANT'S MOTIONS TO DISMISS AND FOR SUMMARY JUDGMENT.

The "Statement of Facts" in the plaintiffs' memorandum brief criticizes the statement of defendant that "the starting time of yard crews of the Standard Oil Company performing the work prior to July 27, 1934, were not the same as the starting times of yard crews of the defendant." This is clearly shown in the "Employees' Statement of Facts" in Docket No. 7324 of the National Railroad Adjustment Board, defendant's Exhibit "F" attached to the affidavit in support of the motion to dismiss.

In like manner, an agreement to waive Article 6 of the yardmen's agreement is admitted by the employees in the "Statement of Claim" and "Position of the Committee" in the same award (defendant's Exhibit "F").

The defendant admits that the complaint in Docket No. 7324, resulting in the award of the National Railroad
86 Adjustment Board of September 6, 1940, was filed before the Board on May 18, 1939, as stated in the last sentence of the affidavit attached to defendant's motion to dismiss.

The plaintiff's in their brief admit that, other than the three criticisms hereinabove answered in this reply in the three preceding paragraphs, the defendant's "statement of facts is correct insofar as it goes."

103 Wherefore, the defendant prays that its motion to dismiss may be granted and that judgment may be entered for the defendant.

Respectfully submitted,

Harry I. Allen,
Paul R. Conaghan,
Attorneys for defendant, Elgin, Joliet and Eastern Railway Company.

106 Exhibit "J"

Letterhead—National Railroad Adjustment Board—

May 18, 1939

Mr. S. M. Rogers, President
Elgin, Joliet & Eastern Railway Company
Chicago, Illinois

Mr. A. F. Whitney, President
Brotherhood of Railroad Trainmen
Cleveland, Ohio

Gentlemen:

Our Docket Numbers 7324 to 7328, inclusive, have been assigned as indicated to the following Elgin, Joliet & Eastern Railway Company—Trainmen's cases, which were submitted ex-parte at the instance of General Chairman Williams, representing the Brotherhood of Railroad Trainmen on that railroad:

7324—"Claim for one day's pay at time and one-half for each foreman and each helper * * * in violation of the fixed starting time provided for in Article 6 of the Yardmen's Agreement."

7325—"Claim of A. D. Fitch, Yardman, South Chicago Yard, for 155 days from February 14, 1938 to July 19, 1938; * * *"

7326—"Claim for one additional yard day at yard helper rate of pay for each of three (3) yardmen, * * * November 1, 1938 to February 7, 1939, inclusive. * * *"

7327—"Claim of Joe Grennes, Yardman, Gary Tin Plate Mill Yard for 14 days' pay at yard helper's rate, June 28, and 29, July 1, 5, 6, 7, 8, 9, 11, 12, 15, 17 and 18, 1938. * * *"

7328—"Claim for B. A. Smith, Foreman, S. F. Johnson and L. Clark, Helpers, * * * September 23, 1938. * * *"

These cases are assumed to be complete and nothing will be added thereto prior to the date of hearing thereon. It should be understood, however, that any argument presented to the Division at the hearing will be confined to

matters incorporated in the submissions, and introduction of evidence at the hearing is foreclosed.

If argument is prepared in form of written brief, copies thereof shall be exchanged between the parties prior to the date of hearing.

107 At the direction of the Division I am sending to the Management copies of the Employees submissions, and to the general Chairman copies of the Management's submissions. This is being done in order that both parties may have an opportunity to study the submissions prior to the date set for hearing.

Yours very truly,
T. S. MacFarland,
Secretary.

TSM:WB
cc:Mr. C. H. Williams

(Letterhead of National Railroad Adjustment Board.)

April 19, 1939.

Mr. S. M. Rogers, President,
Elgin, Joliet & Eastern Railway Company,
208 South La Salle Street,
Chicago, Illinois.

Dear Sir:

In letter of April 18, 1939, Mr. C. H. Williams, General Chairman representing the Brotherhood of Railroad Trainmen on your railroad, served notice of his intention to file ex parte submissions in the five claims which are fully explained under the headings "Statement of Claim," in his letter, a copy of which it is indicated was sent to you.

You are requested in accordance with Circular No. 1 of October 10, 1934, to file by May 19, 1939, fifteen copies of the Management's submissions in these five (5) ex parte cases.

It is assumed that the statements of claim shown in the submissions of both the Management and the Committee will be identical with those shown in the notice letter; and that as provided in Circular No. 1 the submissions from both the Carrier and Committee will affirmatively show that all data submitted in support of their respective

positions has been presented each to the other and made a part of the particular question in dispute.

Very truly yours,
T. S. McFarland,
Secretary.

Endorsed: Chicago President's Office Apr 20, 1939. Railway Company, Elgin, Joliet & Eastern.
TSM/ms
cc: Mr. A. F. Whitney
Mr. S. H. Williams

109 (Letterhead of General Grievance Committee.)

April 18, 1939.

Mr. T. S. McFarland, Secretary,
National Railroad Adjustment Board,
1908 Consumers Building, 220 South State Street,
Chicago, Illinois.

Dear Sir:

Acknowledging receipt of your letter of the 17th calling my attention to an error in notification to the carrier in my offer of submissions to your Board, I am rewriting the letter of notice to conform to the submissions in each case and sending a copy of this letter to carrier.

Statement of Claim: Claim for one day's pay at time and one-half for each foreman and each helper for each day they were required to work in yard service in the Whiting (Standard Oil Company) Yard, in violation of the fixed starting time provided for in Article No. 6 of the Yardmen's Agreement of the Elgin, Joliet & Eastern Railway Company, effective January 1, 1927, and applicable to Whiting (Standard Oil Company) Yardmen, July 27, 1934, from dates of August 27, 1934, until November 14, 1938, inclusive.

Note: Claim made thirty (30) days after agreement was made effective on account of committees agreeing to permit this length of time for yardmen to become accustomed to the changes being made.

Statement of Claim: Claim of A. D. Fitch, Yardman, South Chicago Yard, for 155 days from February 14, 1938, until July 19, 1938, inclusive, on account of being cut off of the board and the Elgin, Joliet & Eastern Railway

Company retaining in the service during that time, a junior yardman.

Statement of Claim: Claim for one additional yard day at yard helper rate of pay for each of three (3) yardmen, assigned as "special switchmen" in Gary Mill Yard to hot cinder crew assignments, from date of November 1, 1938 until February 7, 1939, inclusive, account of requiring each yardman so assigned to work on more than one assignment during his eight (8) hour tour of duty each day between and including those dates.

110 Claim for one day at yard helper rate of pay for three extra yardmen who stood first out each day from November 1, 1938 until February 7, 1939, inclusive, who were deprived of work on account of the carrier failing to assign yardmen to the vacant assignments instead of requiring the "special switchmen" to work on more than one assignment.

Statement of Claim: Claim of Joe Grennes, Yardman, Gary Tin Plate Mill Yard for 14 days pay at yard helper's rate, June 28th, and 29th, July 1st, 5th, 6th, 7th, 8th, 9th, 11th, 12th, 15th, 16th, 17th, and 18th, 1938; on account of using Mr. M. R. Joyce, General Yardmaster, Kirk Yard, in addition to his own duties, to fill the place of Mr. W. R. Brown, Assistant General Yardmaster, Gary Tin Plate Mill Yard, who was off on his annual vacation.

Statement of Claim: Time claim for B. A. Smith, Foreman, S. F. Johnson and L. Clark, Helpers, Whiting Yard, for one yard day at yard rate of pay account of being required to go from their yard in the Whiting (Standard Oil Company) Company plant into the B. & O. C. T. Railway classification yard for a car on date of September 23, 1938.

Oral hearing desired.

Yours truly,
C. H. Williams,
General Chairman, B. of R. T. E. J. & E. System.

copy to:
Mr. S. M. Rogers, President,
E. J. & E. Railway Company,
208 South LaSalle Street,
Chicago, Illinois.

123 And on, to wit, the 19th day of June, 1941, there was filed in the Clerk's office of said Court a certain Report of Proceedings, in words and figures following, to wit:

124 * * (Caption—2341) * *

Report of Proceedings at the hearing of the above entitled case, before the Honorable John P. Barnes, Judge of said court, on the 10th day of February, A. D. 1941.

Present:

Mr. John H. Gately, appeared for plaintiffs;

Messrs. Knapp, Allen & Cushing, by Mr. Paul R. Conaghan, appeared for defendant.

Mr. Gately: If your Honor please, I doubt if your Honor has had the time to read all of the cases that were cited in the short time that the briefs have been on file.

The Court: I read all the parts of those cases quoted in your briefs.

125 Mr. Gately: There were certain parts in some of the cases that were not quoted; for instance, the Rennsler case of Iowa, which was too long for quotation, and, as I suggested in my brief, if your Honor wishes a complete summary of the whole question of labor and carrier insofar as railroad employees are concerned, I think it is very well set forth in that case.

But getting down to the present case, if your Honor please, as I suggested in the brief, if you will look at the letter that they seem to wish to hang their hat on, as I might say, in this case, the letter sets up fundamentally certain claims—I believe there are sixty-one of them, claims and grievances. Now we distinguish between claims and grievances, claims being claims for money due and owing to the employees, and grievances being the failure of the railroad to live up to the terms of its agreement or its contract.

Now the grievance that was presented, and upon which they seek to have this letter act as a release was the only thing that was pending before the National Railroad Adjustment Board at that time, and from the wording of

126 the letter, if your Honor please, I believe your Honor will agree that it would be claims that they seek to have a release given on, so loosely set up by the—

The Court: I thought that letter was quite full and complete, and so did the mediation board, or whatever it calls itself.

Mr. Gately: Well, if your Honor please, that letter, if analyzed, only releases the grievance of the—well, let's get the letter, if your Honor please. The case involved here is case No. 5 set up in the letter, and sets out the starting time of switch engines in the Whiting Standard Oil Yard. There is nothing mentioned in that letter as to any individual members' claims, or any individual's claim of any of the plaintiffs before your Honor. Now that goes back to the last paragraph by setting up all these claims and grievances.

"The settlements proposed are predicated on a complete settlement and withdrawal of all cases now pending—"

Well, the only case pending was the grievance, if your Honor please.

"—either before the board, or under discussion with this office—"

127 Now we can only take words at their ordinarily accepted meaning. I wish to submit that that was the only thing that was pending, the failure of the railroad to live up to the terms of that agreement.

Now counsel devoted some time in his brief to the motion to dismiss. I set up in my reply brief that I would consider his motion to dismiss a motion for a summary judgment, and therefore urge no argument on it. Counsel devoted four or five pages to arguing the question.

He also sets up that there are no issues of fact. I believe, if your Honor will read over the brief carefully, I believe I suggested six separate issues of fact. He seeks to slide over them by stating that they are not material. I think every one of those issues of fact set up there are very material. They go right to the heart of this lawsuit. He stated that we do not cite any facts. We cite all the facts set forth. Now, if your Honor looks at the brief you will see I said "We believe that the facts set forth plus the affidavit of facts filed herein completely set forth the issues." He seems to want to ignore the facts set up in the affidavit.

128 Now on this motion, the question as submitted to the Court is not a matter of law insofar as the legal principles alone are concerned. The question before this Court is set out in *Gordetsky* v. *Shell* in the Circuit Court.

of Appeals, 101 Fed. 2nd, 760, in an action for malicious prosecution, where the plaintiff's affidavit directly controverts defendant's affidavit and supports the allegations of the complaint, it is error for the Court to dismiss the complaint. I wish to submit, if your Honor please, that the affidavit that is filed herein as the counter-affidavit to the plaintiffs' directly and unquestionably controvert the allegations of fact they set up there, and creates, if your Honor please, issues of fact diametrically opposed, by our affidavit and their affidavit, that can only be tried by a jury.

The Court: What is the first one?

Mr. Gately: The first fact, if your Honor please, is whether or not there was any authority in Mr. Williams to present any claim—

The Court: Oh, well, I think, as counsel said, it is ostensible authority. I think they are right about that.

Mr. Gately: If your Honor please, you can't dis-
129 regard all the cases we have quoted here. A union official cannot—and I have quoted, I believe, eight or ten cases which hold directly that union officials cannot waive the individual rights of its members. Now counsel seeks to evade that by stating that those cases were decided prior to the Act in 1934. Now, if your Honor please, the Act of 1934 was an amendment and there is no substantial change as to any of the acts. Furthermore, the United States Circuit Court of Appeals in I. C. R. R. Co. *vs.* Moore quoted several of those cases that I have cited. Now we can't disregard all the courts of the land, and every court in this land, with the exception of the Smith case, if your Honor please, has decided unequivocally down through the whole history of the labor movement that a union official cannot waive the individual rights of its members.

Now, if your Honor please, I think it is very adeptly stated in the Stephenson case, if your Honor please, what could be the result—that isn't the case. There is one case that cited in effect what would be the result if the individual members of a union—in an agreement between
130 the union and the carrier the individual rights would be caught between the millstones, and every individual's rights could be trampled on and waived entirely.

Now all of these cases that I have cited, if your Honor please, were under the Act, the Railway Labor Act of 1926—

The Court: What do you think would have happened had the ruling of the National Railroad Adjustment Board of September 6, 1940, been the opposite of what it was?

Mr. Gately: Had it been the opposite and given an award to these employees I would still say that it was absolutely of no effect. However, I say also that the employees, had they been apprised of it, might have ratified it, but I still say it would have been void. That case was void absolutely without any reference to these employees and without any authority from these employees, if your Honor please, and Williams, the man who filed it, made the statement he took it upon himself to file that, and this carrier knew of that, if your Honor please.

If there is anything at all insofar as jurisdiction and the rights of parties is concerned, I think this is one of the most sublime cases in which it could be tried.

131 In other words, if your Honor please, suppose the members of the union—not the members but the officers of the union decided that they wanted to sell out these men, and they filed a claim that would absolutely abrogate a very vast amount of money that might become due under the terms of a contract, they did it without the knowledge of the members—well, if your Honor please, the Brotherhood of Railroad Trainmen have certain rules and regulations that have to be followed. And this defendant knew it. As a matter of fact, it knew it so well that it appended to its brief the constitution as an exhibit. Now the exhibits are all right here, your Honor. You have the constitution and the schedule, but I didn't think it was well to set up the whole blooming thing as an exhibit, if your Honor please, only the pertinent parts.

Now, then, the defendant knew of all these rules and regulations. They say "ostensible authority." Your Honor mentioned it. Now authority is either absolute or there is no authority. There is no ostensible authority. Either I have authority as an agent of you to go out and sell your house or I haven't authority.

132 The Court: Either you have the authority of your client to come in here or you haven't his authority.

Mr. Gately: Absolutely.

The Court: But whether you have or not, you still filed the claim.

Mr. Gately: If your Honor please, getting back to the railroad, where there are millions of dollars involved, some official of the Brotherhood goes off half cocked—

The Court: What I said was right. It may not apply to an officer of a labor union.

Mr. Gately: That is correct, if your Honor please, that is correct, but for that reason I think the Court should be very careful in giving cognizance to ostensible authority. They either have it or they haven't got it.

The Court: I think it is quite important that this right of this National Railway Adjustment Board be sustained. I think that is important. It is vitally important to your clients even when their interests are adversely affected.

Mr. Gately: Well, if your Honor please—

The Court: I am not claiming that we are starting to try the case over again, but I think it is quite important
133 to society that the authority of that National Railroad Adjustment Board be sustained.

Mr. Gately: I think it is except, if your Honor please, that the act under which they are operating is absolutely unconstitutional. There is no question of it, if your Honor please. It gives a right of review to the employer, but it gives no right of review to the employee, and that is a direct violation of the fifth amendment to the constitution, and your Honor knows it. If you rule the Railroad Adjustment Board's award is final, I have cited several cases to your Honor which show absolutely that the award is not final. There is another question as to the finality of the award in the act itself if the award concerns a money award.

Now counsel takes exception to my statement that that award contained a money award. I submit, if your Honor please, had the award been granted it would have contained a money award, because as it was presented it concerned a money award. Now, under the act itself that isn't a final award.

Counsel also stated in the brief, if your Honor please, that these employees would have no right under the National Railway Labor Act—and he points it out specifi-
134 cally in two instances in his brief—to deal individually with their employer. I would like to call your Honor's attention to the act itself, which states, title 45, paragraph 152, the fourth subdivision thereof, page 221 of the United States Code:

"Provided that nothing in this chapter shall be construed to prohibit a carrier from conferring with employees individually, or local representatives of employees from conferring with the management."

Now, if your Honor please, that is not as far as we attorneys should go, I believe, in quoting law or quoting statements to the Court, and I suggest that counsel has omitted to read the act. Now this Board and the Brotherhood of Railroad Trainmen are not all powerful. They can't utterly disregard the rights of human beings, individuals, if you will. We are still a democracy, I hope, and, if your Honor please, there are the various cases that have been decided by many courts in this land throughout the country from California down through the Southern States up to Maine, where all of the courts have held that the labor union cannot, must not waive the individual rights of
135 its members; and to give effect to this letter, even if the officials had been authorized to enter into this consent, so-called, or complaint, or proceedings, whatever you call it, before the Board, I would say that he had no right to waive without conferring with every member.

If your Honor please, I might cite this as an example: Suppose an attorney had an opportunity to compromise a case, and he individually took it upon himself to settle that case. What would your Honor say? He might have the authority under his contract of employment to settle it, but it certainly would be bad policy, and I think he would be severely criticized by the Bar Association and by his fellow attorneys. But here, if your Honor please, the Brotherhood has set up specific rules where there is a compromise. Counsel set up one provision of that exhibit, but I didn't go into the rest of the exhibits because it isn't material; that is, that a committee, not an individual, must waive or compromise any claim.

Now in this case, if your Honor please, the letter of October 28th was signed by C. H. Williams and Mr. S. F. Johnson, I believe the name is. That is not the entire
136 committee. The committee consists of the general chairman, the general secretary and the local chairman. The local chairman had no knowledge of this letter, and I think it is significant.

Now under the rules—and they knew the rules—they say he had ostensible authority. Well, the authority he had was nothing. Only the general committee had authority and the general committee did not sign this letter. Now if your Honor will look you will see there are three members on that committee, and only three have authority to make any compromise.

I don't think there is anything more to say that I haven't

said in the brief, if your Honor please, except as to the cases cited. Incidentally, several of those cases were not decided before the Act of 1934, as counsel stated, and I again wish to call your attention to the fact that the Act of 1926 is the National Railway Labor Act, and the amendments made in 1934 did not change any substantive rights or liabilities or principles under the old Act. The only thing the new Act did, if your Honor please, was to set up a different personnel. Under the old Act the award of the Board was final; there was no provision at all for review. Under
137 the new Act a right of review is given to the carrier but not to the employees.

Now, if your Honor please, counsel has entirely evaded the constitutionality of this act, and I didn't want your Honor to be burdened with the matter of passing on its constitutionality unless it was necessary. Now if you will notice in my brief, your Honor, I state that in the event the Court feels the award is final—and under the cited decisions I cannot see how your Honor can—but in the event you do feel that the award is final, then I may urgently wish you to consider the constitutionality of this act. Under the provisions of the act, as your Honor is aware, if an award is granted and the carrier doesn't see fit to carry it out after an order has been entered thereunder, the petitioner may appear before the United States District Court here and seek to have it enforced. That appearance or that trial before the Court is a trial de novo opening up the whole case, and the carrier can put in any defenses. He says the award of the Board is termed only prima facie evidence, and under the procedure I submit, if your Honor please, the carrier is the only one entitled to a review. A de-
138 feated employee, as many of these cases hold that I have cited to your Honor, cannot thereby appeal, and there are two or three cases that don't come out directly—the Des Moines case states by inference where the employer has questioned the constitutionality of this act the Court said: "You are certainly not aggrieved. If anyone is aggrieved it is the employee."

I think that is all, if your Honor please.

The Court: If I remember correctly, there was a motion to dismiss and also a motion for summary judgment, is that correct?

Mr. Conaghan: Yes, sir.

Mr. Gately: If your Honor please, under the law a motion to dismiss with affidavits attached should be con-

sidered as a motion for summary judgment, and that is the way I stated in my brief I would consider it, and I think your Honor has read the brief.

The Court: Am I correct in my understanding of the complaint that these various switchmen seek a day and a half pay for every day that they are required to start other than at the time—

Mr. Gately: That is correct, Judge.

The Court: Am I correct in my understanding that that they were paid for the time they actually worked?

139 Mr. Gately: That is correct. Under their agreement, if your Honor has the agreement, that penalty is attached.

The Court: Where is that penalty? I couldn't find it.

Mr. Gately: If your Honor please, I was incorrect in that statement, the schedule itself does not set that forth, but it is the universal custom among railroads throughout the United States that on any overtime—I think I set it up in the complaint—that is the penalty.

Decision.

The Court: In this case it appears that some employees of the Elgin, Joliet & Eastern Railway Company, which employees were members of the Brotherhood of Railroad Trainmen, had a controversy in respect of the starting times of yard crews in the Whiting Standard Oil Yard of the Elgin, Joliet & Eastern Railway Company; that that controversy was presented to the National Railroad Adjustment Board by Mr. C. H. Williams, general chairman of some unit of the Railway Trainmen of the Brother-
140 hood of Railway Trainmen; that subsequently a Mr. Rogers, who was president of the Elgin, Joliet & Eastern Railway Company, addressed a letter to Mr. Williams as general chairman of the Brotherhood of Railway Trainmen, which letter related to the compromise settlement of a large number of controversies pending between the Brotherhood and the Elgin, Joliet & Eastern Railroad Company. One of those matters was case No. 5, Labor Board Docket 3537, starting time of switch engines in Whiting Standard Oil Yard. That letter says:

"Settled by agreement that the starting times, for a ninety day trial period commencing November 15th, 1938, shall be the times provided for in Article 6 of the Yard-

men's Agreement instead of the starting time heretofore agreed upon and now being followed. If at the end of the ninety day trial period the Railway Company or its employees claim that the starting times as fixed in Article 6 do not result in efficient and economical operation and in satisfaction to our employees and to the industry served, then representatives of the Railway Company and representatives of the Yardmen, and representatives of the 142 Engineers and representatives of the Firemen will sit down and work out a schedule of starting time best suited for meeting the special requirements of the industry."

The last paragraph of that letter says:

"We have by this letter given you a complete resume of all of the claims which have not heretofore been disposed of, filed by you on behalf of the employees whom you represent and have proposed in this letter a very liberal disposition of all the cases involved. The settlements proposed are predicated on a complete settlement and withdrawal of all cases now pending either before the board, or under discussion with this office except Case No. 4, which it is understood will be left to a decision by the National Railroad Adjustment Board, and it is further understood that in the event these settlements are accepted that the claims listed in this letter cover all claims of a similar nature, and that no other claims covering the same or like situations will be presented when such claims arise from causes occurring prior to the date of this settlement."

That letter is signed by Mr. Rogers as president, is dated October 28, 1938, and below Mr. Rogers' signature appears "Accepted for the Yardmen: October 31, 1938, 142 C. H. Williams, General Chairman, B. of R. T. S. F. Johnson, Secretary, B. of R. T."

Subsequently the Brotherhood of Railway Trainmen filed another claim with the National Railway Adjustment Board, First Division. The claim says:

Claim for one day's pay at time and one-half for each foreman and each helper for each day they were required to work in yard service in the Whiting (Standard Oil Company) Yard, in violation of the fixed starting time provided for in Article No. 6 of the Yardmen's Agreement of the Elgin, Joliet and Eastern Railway Company, effective January 1, 1927, and applicable to Whiting (Standard Oil Company) Yardmen, July 27, 1934, from dates of August 27, 1934, until November 14, 1938, inclusive."

Now in that matter the board makes reference to this letter from which I have quoted and made the following findings—this is under date of the 6th day of September, 1940:

"Findings: The First Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

"The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and
143 employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

"This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

"The parties to said dispute were given due notice of hearing thereon.

"The evidence shows that the parties to the agreement disposed of the claim here made by the letter of carrier dated October 28th, 1938, accepted by employees October 31, 1938.

Award

"Claim denied per Findings.

National Railroad Adjustment Board
By Order of First Division."

Subsequently the employees filed this suit. There is this question of jurisdiction. The allegation of the complaint is, as I recall, that about half of the—

Mr. Gately: Plaintiffs are residents of Indiana. That is correct, Judge.

The Court: That more than half of the plaintiffs herein are residents of the State of Indiana, and the defendant herein is a corporation created under the laws of the
144 State of Illinois. I take it that if these plaintiffs have claims, each one has a claim, and that there would remain a cause of action and a suit having parties of diverse citizenship even if we caused part of them to be dismissed out, so I am spending no more time on that question.

The great question in the case is as to whether or not this decision of the National Railroad Adjustment Board, Division 1, is an adjudication of the matter as between the parties. On behalf of the plaintiffs it is contended that it is not such an adjudication. On behalf of the defendant it is contended that it is an adjudication. On behalf of the defendant it is said that these proceedings before the Board

were a very good example and a typical example of collective bargaining, and that the result of collective bargaining proceedings should be binding on all parties if they are represented. Certainly the Brotherhood undertook to represent these plaintiffs in that proceeding before the Board. There was no adverse relationship between the Brotherhood and these plaintiffs in that proceeding before the Board, and I think that the controversy was submitted to the Board, that it had jurisdiction and that it
145 was decided, and that the plaintiffs were represented there and are bound thereby. That is the big question, however, in the case.

I assume this case will go up, and I will be glad to have it go up. I think the ruling of the Adjustment Board was binding upon the plaintiffs as well as upon the defendant, and that it is binding on this court in this proceeding.

There is one other question in the case. Paragraph 8 of the complaint says that under the terms of the agreement aforesaid each of the plaintiffs herein is entitled to pay for an additional day at time and a half at the regular daily rate from August 26, 1934, to and including November 14, 1938, for each foreman and each helper for each day that they were required to work in yard service in the Whiting yard of defendant, in accordance with the established practice among the railroad and employees thereof, and as provided for in Article 6 of said agreement aforesaid. Now there is no such provision in Article 6 of the agreement. I couldn't find it any place therein.

The situation there would be very much like the situation in the dim distant past when I was working as a law
146 clerk. If I had arranged when I started to work that I was to come to work every morning at 9 o'clock and have one hour off for lunch and quit work at 5 o'clock, and if some time, two years after or some short time after I started to work my employer should say "Well, hereafter I am going to ask you to come in at 8:30 and you may go home at 4:30", and I had acquiesced and been paid my wages for two years, then after two years I should say to my employer, "Well, I had an agreement with you that I was to start work at 9 o'clock and you have violated that agreement and I want time and a half for each one of those days"—now I not only couldn't under that state of facts have recovered the time and a half for each one of those days, but I couldn't have recovered anything because I ac-

quiesced. On the facts as I have assumed them I don't think—

Mr. Gately: The men did not acquiesce, if your Honor please. They complained immediately.

The Court: Well, even if they did complain all they could get would be their damages, and what would be their damages? It would probably be one of those measurable in one cent damages and costs.

The motion for summary judgment will be granted.

147 Counsel may present findings of fact and conclusions of law and a judgment order not inconsistent with what the Court has stated.

Mr. Gately: How much time will I have on that, your Honor?

The Court: How much time what?

Mr. Gately: How much time will I have to present that? I would like to get an appeal bond.

The Court: The burden is on the defendant to do that.

Mr. Gately: Well at that time you will set the appeal bond?

The Court: Oh, that will be a nominal cost bond.

Mr. Gately: All right, Judge, thank you.

148 Filed Jun 19 1941. At 3:10 o'clock P. M. Hoyt King, Clerk.

Entered Feb. 20, 1941.

111 And afterwards, to wit, on the 20th day of February, A. D. 1941, being one of the days of the regular February term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable John P. Barnes, District Judge, appears the following entry, to wit: Summary Judgment:

112 In the District Court of the United States.

(Caption—2341)

SUMMARY JUDGMENT.

The motion of the defendant in the foregoing entitled case for summary judgment for the defendant and against the plaintiffs, pursuant to Rule 56 (c) of the Rules of Civil Procedure, having been presented, and the Court having considered the pleadings, affidavits, exhibits, admissions and briefs filed by counsel for the plaintiffs and

the defendant, and having heard the oral argument of counsel for the plaintiffs and the defendant upon the whole case, and having considered said motion for summary judgment for the defendant and being fully advised in the premises:

The Court hereby finds that the defendant herein is entitled to a summary judgment as a matter of law.

It Is Hereby Ordered, Adjudged And Decreed that the defendant's motion for summary judgment be, and the same hereby is, granted, that the plaintiffs herein do have and recover nothing by their suit, that the defendant, Elgin, Joliet and Eastern Railway Company, go hence without day, and that the said defendant do have and recover of and from the plaintiffs its costs and charges in this behalf expended and have execution therefor.

Enter:

Barnes,
Judge.

Dated: February 20, 1941.

113 And on, to wit, the 17th day of May, 1941, came the Plaintiffs by their attorney and filed in the Clerk's office of said Court their certain Notice of Appeal in words and figures following, to wit: Filed May 17, 1941.

114 IN THE DISTRICT COURT OF THE UNITED STATES

For the Northern District of Illinois,

Eastern Division.

Harry M. Alderman, *et al.*, *Plaintiffs,* *vs.* Elgin, Joliet and Eastern Railway Company, an Illinois corporation, *Defendants.*	Civil Action No. 2341.

NOTICE OF APPEAL TO CIRCUIT COURT OF APPEALS UNDER RULE 73(b).

Notice Is Hereby Given that Plaintiffs Harry M. Alderman, F. E. Beecue, G. W. Burley, J. E. Challender, W. R. Garvey, J. M. Harr, A. T. Hatfield, R. J. Jones, P. F.

McNamara, R. L. Miller, T. J. Murray, J. C. Newman, Edward R. Nolan, H. A. Schroeder, B. F. Smith, M. F. Starkweather, L. Strodtbeck, Ernest Thompson, and Malcolm H. Young, hereby appeal to the United States Circuit Court of Appeals for the Seventh Circuit from the order entered on February 20, A. D. 1941, as follows:

"It is hereby ordered, adjudged and decreed that the defendants' motion for summary judgment be, and the same hereby is, granted, that the plaintiffs herein do have and recover nothing by their suit, that the defendant, Elgin, Joliet and Eastern Railway Company, go hence without day, and that the said defendant do have and recover of and from the plaintiffs its costs and charges in this behalf expended and have execution therefor."

John H. Gately,
Attorney for Appellants Harry M. Alderman, F. E. Becque, G. W. Burley, J. E. Challender, W. R. Garvey, J. M. Harr, A. T. Hatfield, R. P. Jones, P. M. McNamara, R. L. Miller, T. J. Murray, J. C. Newman, Edward R. Nolan, H. A. Schroeder, B. F. Smith, M. F. Starkweather, L. Strodtbeck, Ernest Thompson, and Malcolm H. Young,
134 S. LaSalle Street,
(Telephone: Franklin 4546)

Filed May 17, 1941.

117 And on, to wit, the 17th day of May, 1941, came the Plaintiffs by their attorney and filed in the Clerk's office of said Court their certain Notice of Filing of Notice of Appeal in words and figures following, to wit:

118 UNITED STATES CIRCUIT COURT OF APPEALS.

(Caption—2341)

NOTICE OF FILING OF NOTICE OF APPEAL.

To: Messrs. Knapp, Allen and Cushing,
208 South LaSalle Street, Chicago:

You are hereby notified that the plaintiffs-appellants have this 16th day of May, A. D. 1941, filed their Notice of Appeal in the above entitled cause, a copy of which notice of appeal is hereto attached and served upon you.

John H. Gately,
John H. Gately,
Attorney for Plaintiffs-Appellants.

Received a copy of the above notice of filing of notice of appeal, together with copy of Notice of Appeal therein referred to, this 16th day of May, A. D. 1941.

Knapp, Allen & Cushing,
Harry I. Allen,
Paul R. Conaghan.

121 And on, to wit, the 6th day of June, 1941, came the Plaintiffs by their attorney and filed in the Clerk's office of said Court their certain Statement of Points in words and figures following, to wit: Filed June 6, 1941.

129 IN THE DISTRICT COURT OF THE UNITED STATES.

(Caption—2341)

STATEMENT OF POINTS.

Plaintiffs-Appellants herewith present the points upon which they claim the court erred:

1. In denying the Plaintiffs' Motion to Strike the Defendants' Motion to Dismiss the complaint, said motion to dismiss containing pleas of res judicata and release.
2. In allowing the Motion of the Defendant for summary judgment.
3. In entering Judgment that the Plaintiffs take nothing by their complaint.
4. In denying the Plaintiffs' right to trial by jury of the issues of fact set up in the complaint; and the issues of fact improperly raised by the Defendants in their motion and affidavit, that is the plea of release therein contained.

Harry M. Alderman, et al.,
By: Gately and Walsh,
By: John H. Gately,
Their Attorneys.

Filed May 17, 1941. 115 And on, to wit, the 17th day of May, 1941, came the Plaintiffs by their attorney and filed in the Clerk's office of said Court their certain Bond on Appeal in words and figures following, to wit:

116 Bond of Appeal.

Know All Men by These Presents: That we, Harry M. Alderman, F. E. Beecue, G. W. Burley, J. E. Challender, W. R. Garvey, J. M. Harr, A. T. Hatfield, R. P. Jones, P. F. McNamara, R. L. Miller, T. J. Murray, J. C. Newman, Edward R. Nolan, B. F. Smith, H. A. Schroeder, M. F. Starkweather, L. Strodtbeck, Ernest Thompson, and Malcolm H. Young, as principals, are held and firmly bound unto Elgin, Joliet and Eastern Railway Company, a corporation, in the full and just sum of One Hundred Dollars ($100.00), to be paid to the said Elgin, Joliet and Eastern Railway Company, a corporation, its attorneys, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents. Sealed with our seals and dated this 15th day of May, in the year of our Lord one thousand nine hundred and forty-one.

Whereas, lately at a session of the District Court of the United States for the Northern District of Illinois, Eastern Division, in a suit pending in said Court between Harry Alderman and others, plaintiffs, and Elgin, Joliet and Eastern Railway Company, a corporation, defendant, a decree was rendered against the said Harry Alderman and others, and the said Harry Alderman and others, having filed their notice of appeal in the United States Circuit Court of Appeals for the Seventh Circuit in the Clerk's Office of the District Court to reverse the decree of the aforesaid suit in the United States Circuit Court of Appeals for the Seventh Circuit, to be holden at Chicago, within forty days from the date hereof.

Now, the condition of the above obligation is such, that if the said Harry Alderman and others, as listed above and subscribed hereto shall prosecute their said appeal to effect, and shall answer all costs that may be awarded against them if they fail to make their plea good, then the

above obligation to be void; otherwise to remain in full force and virtue.

Sealed and delivered in
the presence of:
John H. Gately,
Maurice J. Walsh.

Edward R. Nolan,	(Seal)	M. F. Starkweather,	(Seal)
Harry M. Alderman,	(Seal)	P. F. McNamara,	(Seal)
F. E. Beecue,	(Seal)	R. L. Miller,	(Seal)
G. W. Burley,	(Seal)	T. J. Murray,	(Seal)
J. E. Challender,	(Seal)	J. C. Newman,	(Seal)
W. R. Garvey,	(Seal)	B. F. Smith,	(Seal)
J. M. Harr,	(Seal)	H. A. Schroeder,	(Seal)
A. T. Hatfield;	(Seal)	L. Strodtbeck,	(Seal)
R. J. Jones,	(Seal)	Ernest Thompson,	(Seal)
by John H. Gately, *Attorney in Fact.*		Malcolm H. Young, by John H. Gately, *Attorney in Fact.*	(Seal)

Approved May 19, 1941.

Barnes,
Judge.

119 And afterwards, to wit, on the 19th day of May, 1941, being one of the days of the regular May term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable John P. Barnes, District Judge, appears the following entry, to wit: Entered May 19, 1941.

120 In the District Court of the United States.

(Caption—2341)

Monday, May 19, 1941.

Present: Hon. John P. Barnes, District Judge.

On motion of Plaintiffs' attorneys, It Is Ordered that the Appeal Bond heretofore filed May 17, A. D. 1941, be and the same is hereby approved.

149 And on, to wit, the 20th day of June, 1941, came the Plaintiffs-Appellants by their attorneys and filed in the Clerk's office of said Court their certain Motion in words and figures following, to wit:

Filed June 20, 1941.

150 IN THE DISTRICT COURT OF THE UNITED STATES.

* * * (Caption—2341) * * *

MOTION TO EXCLUDE FROM THE RECORD AND FROM DEFENDANT'S DESIGNATION OF ADDITIONAL PORTIONS OF THE RECORD.

Now come the Plaintiffs herein, by John H. Gately, their Attorney, and move the Court to exclude from the record in this case now being prepared for appeal by the Clerk of this Court and from the Designation of Additional Portions of the Record filed by the Defendants:

1. Item "No. 1, Date Dec. 12, 1940 Motion to dismiss," etc., which is the same pleading as set up in appellant's Designation of Record, in Item 4, Dec. 10, 1940.

2. The Document, "Item No. 2, Feb. 6, 1941 Memorandum of reply to

I. Plaintiff's motion to strike.
II. Counter-affidavit of plaintiffs.
III. Plaintiff's answer relating to "Res Adjudicata and Release" set forth in defendant's motions.
IV. Memorandum brief in answer to defendant's motions to dismiss and for summary judgment,

and Exhibits G to I, inclusive, attached thereto, filed with the Secretary of Honorable John P. Barnes, Judge of the United States District Court."

151 for the reason that said document is not a pleading but a brief and was not properly filed with the Clerk as a pleading and has no place in the law record. That said document is not under oath and purports to contain Exhibits which purport to be copies of letters, but which Exhibits are not shown to nor supported by affidavit, nor properly presented for consideration by the Court.

3. Item "No. 3, Feb. 10, 1941 Report of proceedings and opinion of the court on defendant's motion for summary judgment," for there were no proceedings nor recorded proceedings cognizable as a part of the record on appeal; and to the knowledge of the Plaintiffs there was no written nor recorded opinion by the Court in this case other than the Order being appealed from, nor was such opinion filed with the Clerk of this Court.

Wherefore, your Plaintiffs pray that said items of designation by the Defendants herein as aforesaid will be

excluded from the record on appeal herein and the Defendant's designation of additional portions of the record be stricken.

John H. Gately,
Attorney for Plaintiff.

152 And afterwards, to wit, on the 20th day of June, A. D. 1941, being one of the days of the regular June term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable John P. Barnes, District Judge, appears the following entry, to wit: Entered June 20, 1941.

153 IN THE DISTRICT COURT OF THE UNITED STATES.

(Caption—2341)

ORDER.

This cause coming on to be heard upon the motion of the Plaintiffs herein to exclude from the record on appeal, and from the Defendant's designation of additional portions of the record, certain items set up in said motion, and it appearing to the court that said Defendants have agreed to exclude Item No. 1 of their designation of the additional portions of the record, and it appearing that all parties entitled thereto having received notice thereof and after a hearing thereon.

It Is Ordered that the motion of the plaintiffs to exclude Items numbered 2 and 3 of Defendant's designation of additional portions of the record is hereby overruled without prejudice.

Enter:

Barnes,
Judge.

154 And on, to wit, the 6th day of June, 1941, came the Plaintiffs by their attorney and filed in the Clerk's office of said Court their certain Designation of Contents of Record on Appeal in words and figures following, to wit:

Filed June 6, 1941. 155 IN THE DISTRICT COURT OF THE UNITED STATES.

(Caption—2341)

DESIGNATION OF CONTENTS OF RECORD OF APPEAL.

No. Date

1. Nov. 19, 1940. Complaint.
2. Nov. 19, 1940 Summons.
3. Nov. 19, 1940. Security for costs.
4. Dec. 10, 1940. Motion of defendant to dismiss and affidavit in support.
5. Dec. 24, 1940. Notice and motion to strike defendant's motion to dismiss.
6. Dec. 24, 1940. Order on motion of plaintiff to strike.
7. Jan. 13, 1941. Motion for summary judgment.
8. Jan. 29, 1941. Reply to motion setting up pleas of *res adjudicata* and release on a motion for a summary judgment.
9. Jan. 29, 1941. Counter affidavit to affidavit in support of motion to dismiss.
10. Feb. 20, 1941. Order summary judgment of dismissal of complaint,
11. May 17, 1941. Notice of appeal to United States Circuit Court of Appeals.
12. May 17, 1941. Bond on appeal.
13. May 17, 1941. Notice of filing notice of appeal.

156 14. May 19, 1941. Order appeal bond heretofore filed herein May 17, 1941 approved.

15. June 6, 1941. Statement of Points.

John H. Gately,
Maurice J. Walsh,
Attorney for Appellants.
134 S. LaSalle Street, Chicago
Telephone: Franklin 4546.

Received a copy of the foregoing Designation of Contents of Record on Appeal this 6th day of June, A. D. 1941.

Knapp, Allen and Cushing,
Attorneys for Appellee.

157 And on, to wit, the 13th day of June, 1941, came the Defendant-Appellee by its attorneys and filed in the Clerk's office of said Court its certain Designation of Additional Portions of Record in words and figures following, to wit: Filed June 13, 1941.

158 IN THE DISTRICT COURT OF THE UNITED STATES.

(Caption—2341)

DESIGNATION OF ADDITIONAL PORTIONS OF THE RECORD, PROCEEDINGS AND EVIDENCE TO BE INCLUDED IN RECORD ON APPEAL.

No. Date

1. Dec. 10, 1940. Motion to dismiss, affidavit in support of motion to dismiss, Exhibits A to F, inclusive, attached to the affidavit in support of motion to dismiss.

2. Feb. 6, 1941. Memorandum of reply to

I. Plaintiffs' motion to strike.

II. Counter-affidavit of plaintiffs.

II. Plaintiffs' answer relating to "Res Adjudicata and Release" set forth in defendant's motions.

IV. Memorandum brief in answer to defendant's motions to dismiss and for summary judgment.

and Exhibits G to I, inclusive, attached thereto, filed with the Secretary of Honorable John P. Barnes, Judge of the United States District Court.

3. Feb. 10, 1941. Report of proceedings and opinion of the court on defendant's motion for summary judgment.

Harry I. Allen,
Paul R. Conaghan,
Attorneys for Elgin, Joliet and Eastern Railway Company, Appellee.
208 S. LaSalle Street,
Chicago, Illinois.
Telephone: State 0300.

159 Received a copy of the foregoing designation of additional portions of the record, proceedings and

evidence to be included in record on appeal this 13th day of June, 1941.

John H. Gately,
Attorney for Appellants.

Filed June 20, 1941.

160 And on, to wit, the 20th day of June, 1941, came the Plaintiffs-Appellants by their attorneys and filed in the Clerk's office of said Court their certain Amended Designation of Contents of Record on Appeal in words and figures following, to wit:

161 IN THE DISTRICT COURT OF THE UNITED STATES.

(Caption—2341)

AMENDED DESIGNATION OF CONTENTS OF RECORD OF APPEAL.

By leave of Court first had and obtained, Plaintiffs-Appellants herein file this as their amendment to the Designation of Contents of Record on Appeal:

No.	Date.	
16.	June 20, 1941.	Motion to Exclude from the Record.
17.	June 20, 1941.	Order Denying Motion.

John H. Gately,
Maurice J. Walsh,
Attorney for Appellants.
134 S. LaSalle Street, Chicago
Telephone: Franklin 4546.

Received a copy of the foregoing Amended Designation of Contents of Record on Appeal this 20th day of June, A. D. 1941.

Harry I. Allen and
Paul R. Conaghan,
Attorneys for Appellee.

1 Pleas in the District Court of the United States for the Northern District of Illinois, Eastern Division, begun and held at the United States Court Room, in the City of Chicago, in said District and Division, before the Honorable John P. Barnes, District Judge of the United States for the Northern District of Illinois on thirteenth day of November, in the year of our Lord one thousand nine hundred and forty-two, being one of the days of the regular November Term of said Court, begun Monday, the 2nd day of November, and of our Independence the 167th year.

Present:

Honorable John P. Barnes.
William H. McDonnell, U. S. Marshal.
Roy H. Johnson, Clerk.

2 IN THE DISTRICT COURT OF THE UNITED STATES

Northern District of Illinois,

Eastern Division.

G. W. Burley, James E. Challender, W. R. Garvey, J. M. Harr, A. T. Hatfield, R. P. Jones, P. F. McNamara, R. L. Miller, H. A. Schroeder, B. F. Smith and M. H. Young,	No. 2341.
vs.	
Elgin, Joliet and Eastern Railway Company, a corporation.	

Be It Remembered, that the following petition was filed in the above-entitled cause in the office of the Clerk of the District Court of the United States for the Northern District of Illinois, Eastern Division, on this the 2nd day of November, 1942.

Filed Nov. 2, 1942

3 IN THE DISTRICT COURT OF THE UNITED STATES.

(Caption—2341)

PETITION.

Now come the plaintiffs herein, G. W. Burley, James E. Challender, W. R. Garvey, J. M. Harr, A. T. Hatfield, R. J. Jones, P. F. McNamara, R. L. Miller, H. A. Schroeder, B. F. Smith, and M. H. Young, by John H. Gately, their attorney, and respectfully submits to the Court that heretofore on, to-wit, the 10th day of February, A. D. 1942, the United States Circuit Court of Appeals for the Seventh Circuit rendered a decision in the above-entitled cause, wherein the judgment heretofore rendered herein was reversed, and directions issued to proceed in accordance with said opinion, which suggested that certain amendments should be made to the pleadings filed herein.

Your petitioners further respectfully state that a mandate from the United States Circuit Court of Appeals has been duly filed herein.

Your petitioners pray that they may be allowed to amend said Complaint by substituting in lieu of Paragraph 1 thereof, the attached amendment, and in lieu of Paragraph 9 thereof, the attached amendment, which said amendments shall amend all of the pleadings filed herein, and briefs, abstracts, and memoranda filed of record in the United States Circuit Court of Appeals.

4 Petitioners further pray that this Honorable Court will render a decision on the amended Complaint, and that the Motion and Counter-motion and all other pleadings filed subsequent to said original Complaint, may stand as Motions and Counter-motions to the Complaint as amended; that the Court may render its decision thereon, and that an appeal may be granted forthwith on the said Amended Complaint and decision thereunder, and that the Clerk of this Court may be instructed to certify said amendments to the United States Circuit Court of Appeals for the 7th Circuit; that the record heretofore certified may stand with said amendments so added.

And Your Petitioners Will Ever Pray.

G. W. Burley, James E. Challender, W. R. Garvey, J. M. Harr, A. T. Hatfield, R. P. Jones, P. F. McNamara, R. L. Miller, H. A. Schroeder, B. F. Smith, M. H. Young,
By John H. Gately,
By John H. Gately,
134 S. LaSalle Street,
Franklin 4546.

State of Illinois } ss.
County of Cook }

John H. Gately, being first duly sworn, on oath deposes and says that he is the attorney for the plaintiffs-appellants in the above-entitled cause; that he has read the Petition, by him subscribed, knows the contents thereof, and believes the same to be true in substance and in fact.

John H. Gately.

Subscribed and Sworn to before me this 26th day of October, A. D. 1942.

Herman Herson,
Notary Public.

(Seal)

5 Amendments to the Complaint.

Amendment to Paragraph 1:

The plaintiffs herein, G. W. Burley, James E. Challender, W. R. Garvey, J. M. Harr, A. T. Hatfield, R. P. Jones, P. F. McNamara, R. L. Miller, H. A. Schroeder, B. F. Smith, and M. H. Young, are all residents of the State of Indiana, and the defendant herein is a corporation incorporated under the laws of Illinois; and that the matters in controversy exceed, exclusive of interest and costs, the sum of $3,000.00.

Amendment to Paragraph 9;

That by reason of the violation of said agreement as aforesaid by the defendant, the approximate following amounts with interest thereon at five per cent (5%) per annum from the date due until paid, are owed plaintiffs by defendant, as follows:

G. W. Burley	$ 7,000.00
James E. Challender	4,500.00
W. R. Garvey	14,000.00
J. M. Harr	3,500.00
A. T. Hatfield	7,000.00
R. P. Jones	6,974.00
P. F. McNamara	4,800.00
R. L. Miller	7,000.00
B. F. Smith	7,000.00
M. H. Young	3,500.00

6 And afterwards, to wit, on the 13th day of November, A. D. 1942, being one of the days of the regular November term of said Court, in the record of proceedings thereof, in said entitled cause, before the Honorable John P. Barnes, District Judge appears the following entry, to wit:

7 IN THE DISTRICT COURT OF THE UNITED STATES. Entered Nov. 13, 1942.

(Caption—2341)

ORDER.

This cause coming on to be heard upon the Petition of G. W. Burley, James E. Challender, W. R. Garvey, J. M. Harr, A. T. Hatfield, R. P. Jones, P. F. McNamara, R. L. Miller, H. A. Schroeder, B. F. Smith, and M. H. Young, by John H. Gately, their attorney, and it appearing to the Court that a decision was heretofore rendered by the United States Circuit Court of Appeals for the Seventh Circuit, on the 10th day of February, A. D. 1942, remanding the above entitled cause to this Court for the purposes of amendment, and upon Stipulation of the parties that the decision presented this day before the Court was the decision of the United States Circuit Court of Appeals for the Seventh Circuit, and it appearing in said Petition that said plaintiffs desire to amend said Complaint filed herein, by deleting therefrom certain parties who were residents of Illinois, and amending the ad damnum for certain parties plaintiff; that said amendments shall be considered as amendments to all pleadings filed herein, and that the motions and counter-motions filed to the original Complaint filed herein shall stand as motions and counter-motions to the Complaint as amended, and the evidence addueed and the arguments presented to said original Complaint shall stand as evidence and arguments to the Complaint as
8 amended and all motions and counter-motions, and it appearing that plaintiffs and defendant are represented in Court by counsel;

It is Hereby Ordered, Adjudged and Decreed that the amendments set forth in said Petition filed herein be, and the same are hereby allowed to be filed to the original Complaint as amended herein, and are to be considered as amendments to all pleadings in said cause; and

It Is Further Ordered that all motions and counter-motions filed herein to said Complaint may stand as motions and counter-motions to said Complaint as amended; and

It is Further Ordered that the evidence, affidavits and points of law presented with reference to the original Complaint shall stand as the evidence, affidavits and points

of law to the said Complaint as amended and all motions and counter-motions; and

It Is Further Ordered that said cause is now standing at issue upon the Complaint as amended and the motions and counter-motions, with affidavits attached and admissions made by counsel in open Court, and upon the motion of the defendant to dismiss the Complaint; and

The motion of the defendant in the foregoing entitled case for summary judgment for the defendant and against the plaintiffs, pursuant to Rule 56 (c) of the Rules of Civil Procedure, having been presented, and the Court having considered the pleadings, affidavits, exhibits, admissions and briefs filed by counsel for the plaintiffs and the defendant, and having heard the oral argument of counsel for the plaintiffs and the defendant upon the whole case, and having considered said motions to dismiss and for summary judgment for the defendant and being fully advised in the premises:

9 The Court has reconsidered its opinion as expressed in the report of proceedings in this case on the 10th day of February, 1941, and hereby affirms its opinion.

The Court hereby finds that the defendant herein is entitled to a summary judgment as a matter of law.

It Is Hereby Ordered, Adjudged and Decreed that the defendant's motion for summary judgment be, and the same hereby is, granted, that the plaintiffs herein do have and recover nothing by their suit, that the defendant, Elgin, Joliet and Eastern Railway Company, go hence without day, and that the said defendant do have and recover of and from the plaintiffs its costs and charges in this behalf expended and have execution therefor.

Enter:

John P. Barnes,
Judge.

Dated: November 13, 1942.

10 And on, to wit, the 28th day of December, 1942, came the Plaintiffs by their attorney and filed in the Clerk's office of said Court their certain Notice of Appeal in words and figures following, to wit:

11 IN THE DISTRICT COURT OF THE UNITED STATES, Filed Dec. 28, 1942.

Northern District of Illinois,

Eastern Division.

G. W. Burley, *et al.*, *Plaintiffs*, *vs.* Elgin, Joliet and Eastern Railway Company, a corporation, *Defendants.*	Civil Action. No. 2341.

NOTICE OF APPEAL TO THE CIRCUIT COURT OF APPEALS UNDER RULE 73(b).

Notice is Hereby Given that plaintiffs, G. W. Burley, James E. Challender, W. R. Garvey, J. M. Harr, A. T. Hatfield, R. P. Jones, P. F. McNamara, R. L. Miller, H. A. Schroeder, B. F. Smith, and M. H. Young, by John H. Gately, their attorney, hereby appeal to the United States Circuit Court of Appeals for the Seventh Circuit from the order entered on the 13th day of November, A. D. 1942, as follows:

It Is Therefore Ordered that the defendant's motion for summary judgment be, and the same is, hereby granted that the plaintiffs herein do have and recover nothing by their suit; that the defendant, Elgin, Joliet and Eastern Railway Company, go hence without day, and that the said defendant do have and recover of and from the plaintiffs its costs and charges in this behalf expended and have execution therefor.

G. W. Burley, James E. Challender, W. R. Garvey, J. M. Harr, A. T. Hatfield, R. P. Jones, P. F. McNamara, R. L. Miller, H. A. Schroeder, B. F. Smith, and M. H. Young,
By John H. Gately,

John H. Gately,
134 S. La Salle Street,
Franklin 4546.

Filed Dec. 28, 1942.

12 And on, to wit, the 28th day of December, 1942, came the Plaintiffs by their attorney and filed in the Clerk's office of said Court their certain Notice of Filing of Notice of Appeal in words and figures following, to wit:

13 IN THE DISTRICT COURT OF THE UNITED STATES.

(Caption—2341)

NOTICE OF FILING OF NOTICE OF APPEAL.

To: Messrs. Knapp, Allen and Cushing,
Attorneys for Defendant,
208 S. La Salle Street,
Chicago, Illinois.

You Are Hereby Notified that the plaintiffs-appellants have this 28th day of December, A. D. 1942, filed their Notice of Appeal in the above-mentioned cause, a copy of which Notice of Appeal is hereto attached and served upon you.

John H. Gately,
134 S. La Salle Street,
Franklin 4546,
Attorney for Plaintiffs-Appellants.

Received a copy of the above Notice of filing of Notice of Appeal, together with copy of Notice of Appeal therein referred to, this 28th day of December, A. D. 1942.

Paul R. Conaghan.

14 And on, to wit; the 28th day of December, 1942, came the Plaintiffs-Appellants by their attorney and filed in the Clerk's office of said Court their certain Statement of Points in words and figures following, to wit:

15 IN THE DISTRICT COURT OF THE UNITED STATES. Filed Dec. 28, 1942.
(Caption—2341)

STATEMENT OF POINTS.

Plaintiffs-Appellants herewith present the points upon which they claim the Court erred:

1. In denying the Plaintiffs' Motion to Strike the Defendant's Motion to Dismiss the Complaint, said motion to dismiss containing pleas of res judicata and release.
2. In allowing the motion of the defendant for summary judgment.
3. In entering judgment that the plaintiffs take nothing by their complaint.
4. In denying the Plaintiffs' right to trial by jury of the issues of fact set up in the complaint; and the issues of fact improperly raised by the Defendants in their motion and affidavit, that is the plea of release therein contained.

G. W. Burley, et al.,
By John H. Gately,
John H. Gately,
134 S. La Salle St.,
Franklin 4546.

16. And on, to wit, the 13th day of February, 1943, came the Plaintiffs-Appellants by their attorney and filed in the Clerk's office of said Court their certain Designation of Contents of Record on Appeal in words and figures following, to wit: Feb. 13, 1942. Filed

17 IN THE DISTRICT COURT OF THE UNITED STATES.
(Caption—2341)

DESIGNATION OF CONTENTS OF RECORD ON APPEAL.

1). Transcript of proceedings heretofore filed in the United States Circuit Court of Appeals, their case No. 7717.
2). Petition for leave to amend Complaint.
3). Order of Court entered on said Petition.

4). Notice of Appeal to the United States Circuit Court of Appeals.
5). Notice of filing Notice of Appeal.
6). Statement of Points.

John H. Gately,
John H. Gately,
Attorney for Plaintiffs.

Received a copy of the Designation of Contents of Record on Appeal, this 13th day of February, A. D. 1943.

Paul R. Conaghan,
Attorney for Defendant.

Northern District of Illinois, } ss.
Eastern Division, }

I, Roy H. Johnson, Clerk of the District Court of the United States for the Northern District of Illinois, do hereby certify the above and foregoing to be a true and complete Amended transcript of the proceedings had of record made in accordance with Designations filed in this Court in the cause entitled G. W. Burley, James E. Challender, W. R. Garvey, J. M. Harr, A. T. Hatfield, R. P. Jones, P. F. McNamara, R. L. Miller, H. A. Schroeder, B. F. Smith and M. H. Young *vs.* Elgin, Joliet & Eastern Railway Company, a corporation, No. 2341, as the same appear from the original records and files thereof, now remaining in my custody and control.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court at my office, in the City of Chicago, in said District, this 21st day of April, A. D. 1943.

Roy H. Johnson,
Clerk.

(Seal)

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

I, Kenneth J. Carrick, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages contain a true copy of the printed record, printed under my supervision and filed on the twenty-eighth day of May, 1943, in:

Cause No. 8249

G. W. Burley, *et al.*,
Plaintiff-Appellants,

vs.

Elgin, Joliet and Eastern Railway Company, a Corp.,
Defendant-Appellee.

as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this 5th day of April, A. D. 1944.

Kenneth J. Carrick
(Seal) *Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.*

At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit, held in the City of Chicago, and begun on the sixth day of October, in the year of our Lord one thousand nine hundred and forty-two, and of our independence, the one hundred and sixty-seventh.

G. W. Burley, *et al.*, *Plaintiffs-Appellants*, *vs.* Elgin, Joliet and Eastern Railway Company, a Corporation, *Defendant-Appellee.*	Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.
8249	

And, to-wit: On the twenty-fourth day of February, 1943, there was filed in the office of the Clerk of this Court, an appearance of counsel for appellants, which said appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

Cause No. 8249

G. W. Burley, *et al.*,

vs.

Elgin, Joliet and Eastern Railway Company, a Corporation.

The Clerk will enter my appearance as counsel for appellants.

John H. Gately,
134 S. La Salle St.

Endorsed: Filed February 24, 1943. Kenneth J. Carrick, Clerk.

And afterwards, to-wit: On the seventeenth day of April, 1943, there was filed in the office of the Clerk of this Court, an appearance of counsel for appellee, which said appearance is in the words and figures following, to-wit:

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

Cause No. 8249

G. W. Burley, *et al.*,
Plaintiffs-Appellants.

vs.

Elgin, Joliet and Eastern Railway Company,
a corporation,
Defendant-Appellee.

The Clerk will enter my appearance as counsel for defendant-appellee.

Paul R. Conaghan,
208 South La Salle Street,
Chicago, Ill.

Endorsed: Filed April 17, 1943. Kenneth J. Carrick, Clerk.

And afterwards, to-wit: On the fifteenth day of October, 1943, the following further proceedings were had and entered of record, to-wit:

Friday, October 15, 1943.

Court met pursuant to adjournment.

Before:

Hon. J. Earl Major, Circuit Judge.
Hon. Otto Kerner, Circuit Judge.
Hon. Sherman Minton, Circuit Judge.

8249

G. W. Burley, *et al.*,
Plaintiff-Appellants,
vs.
Elgin, Joliet and Eastern Railway Company, a Corporation,
Defendant-Appellee.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

Now this day come the parties by their counsel, and this cause comes on to be heard on the transcript of the record and the briefs of counsel, and on oral argument by Mr. John H. Cately, counsel for appellant, and by Mr. Paul R. Conaghan, counsel for appellee, and the Court takes this matter under advisement.

And afterwards, to-wit: On the tenth day of November, 1943, there was filed in the office of the Clerk of this Court, the Opinion of the Court, which said Opinion is in the words and figures following, to-wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

No. 8249. **October Term and Session, 1943.**

G. W. BURLEY, Et Al.,
Plaintiffs-Appellants,
vs.
ELGIN, JOLIET AND EASTERN RAILWAY COMPANY, A Corporation,
Defendant-Appellee.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

November 10, 1943.

Before MAJOR, KERNER, and MINTON, *Circuit Judges.*

MINTON, *Circuit Judge.* Prior to July 24, 1934, the plaintiffs-appellants were employed as switching crews in the yards of the Standard Oil Company at Whiting, Indiana. The defendant-appellee took over the operations in the yards, and employed the plaintiffs as switching crews.

The complaint alleges that the plaintiffs were members of the Brotherhood of Railroad Trainmen, and that the defendant and the plaintiffs agreed that as to rates of pay, hours, and working conditions, the parties should be governed by a schedule or agreement then in force between the defendant and its employees, which had been negotiated by the Brotherhood of Railroad Trainmen as a representative of the switching crews of the defendant. It was alleged that Article 6 of the schedule or agreement provided that the switch engines should start from a certain place at a certain time; that this Article 6 was by agreement of the plaintiffs and the defendant suspended for the first thirty days of the employment of the plaintiffs

by the defendant, and that after the expiration of the said thirty-day period and until November 14, 1938, the defendant violated said Article 6; that for the defendant's failure to observe Article 6, it became liable, under the terms of the agreement and in accordance with the established practice among railroads, to pay the plaintiffs as damages for each day's violation an additional day's pay at time and one-half. The sufficiency of this complaint was raised by a motion to dismiss.

We think the complaint states prima facie a cause of action. It is alleged that it is the duty of the defendant to observe Article 6 of the employment schedule or agreement, and that the defendant has violated Article 6, and by reason of such violation, the plaintiffs are entitled to damages; and that the amount of the damages is fixed "in accordance with the established practice among railroads and employees thereof, and as provided in said Article 6 of said agreement as aforesaid." Article 6 is set forth in the complaint and contains no provision for damages in the event of its violation, or the measure thereof. It was contended by the defendant that the custom and usage relied upon to measure the damages was not sufficiently alleged. We think that the allegation of the custom and usage was sufficient to withstand a motion to dismiss. *Lemos v. Madden*, 28 Wyo. 1, 200 Pacific 791. Certainly, under the liberal practice of pleading permitted under the Federal Rules of Civil Procedure, this allegation is sufficient.

It was also contended by the defendant that there was no allegation that the defendant knew of this custom and usage. It has been held by us that parties to a contract engaged in the same trade will be presumed to have contracted with reference to, and to have knowledge of, all lawful usages of that trade. *Western Petroleum Co. v. Tidal Gasoline Co.*, 284 Fed. 82, 84. The allegation of knowledge on the part of the defendant was not necessary, as the plaintiffs and the defendant were engaged in the same industry, and an allegation showing the fact of such relationship is sufficient.

At the time the defendant filed the motion to dismiss, it set forth in a pleading accompanying the motion the defense that any claims the plaintiffs might have had were compromised and settled by the plaintiffs' agents,

who were the Chairman and the Secretary of the Grievance Committee of the Brotherhood of Railroad Trainmen, the bargaining agents for the plaintiffs. Affidavits and certain documents were attached to this hybrid pleading, and a motion to strike it was filed by the plaintiffs.

Thereafter, the defendant filed a motion for summary judgment. The plaintiffs then filed a reply to this motion, in which it was alleged the said bargaining agents were not authorized to negotiate, compromise, and settle any claims the plaintiffs might have for damages for violation of Article 6, and that their authority was limited "to prosecuting a complaint before the Board to compel the defendant to comply with Article 6." Affidavits, bylaws, and the constitution of the labor organization were exhibited. The defendant filed its reply to the plaintiffs' motion to strike and to the counter-affidavits of the plaintiffs. The District Court granted the defendant's motion for summary judgment.

Was the defendant entitled to summary judgment? We think the motion should not have been granted, because it seems clear to us that this record presents a question of fact as to whether a compromise of the claims relied upon in the plaintiffs' complaint had been compromised by the plaintiffs' agents. This depends upon the authority of the so-called agents of the plaintiffs to negotiate, compromise, and settle plaintiffs' claims for damages for the violation of Article 6. The plaintiffs admit they authorized the bargaining agents to negotiate, which carried with it the right to compromise and settle, the question of what the defendant was going to do about the observance of Article 6. But the plaintiffs deny that they ever gave authority to the bargaining agents to negotiate, compromise, and settle their claim for damages for past violations of Article 6.

The procedure for summary judgment was intended to expedite the settlement of litigation where it affirmatively appears upon the record that in the last analysis there is only a question of law as to whether the party should have judgment in accordance with the motion for summary judgment. If there was any question of fact presented on the record in the proceedings for summary judgment, the motion could not be sustained. *Campana Corporation* v. *Harrison*, 135 F. 2d 334, 336. Because we think this

record affirmatively shows there was an issue of fact, the motion for summary judgment should not have been granted.

The judgment is reversed, and the cause remanded, with instructions to proceed in accordance with this opinion.

Endorsed: Filed November 10, 1943. Kenneth J. Carrick, Clerk.

And on the same day, to-wit: On the tenth day of November, 1943, the following further proceedings were had and entered of record, to-wit:

Wednesday, November 10, 1943.

Court met pursuant to adjournment.

Before:

Hon. J. Earl Major, Circuit Judge.
Hon. Otto Kerner, Circuit Judge.
Hon. Sherman Minton, Circuit Judge.

G. W. Burley, *et al.*, *Plaintiffs-Appellants,* vs. Elgin, Joliet and Eastern Railway Company, a Corporation, *Defendant-Appellee.*	Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

8249

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, reversed, with costs, and that this cause be, and the same is hereby, remanded to the said District Court with instruction to proceed in accordance with the opinion of this Court filed this day.

And afterwards, to-wit: On the twenty-sixth day of November, 1943, there was filed in the office of the Clerk of this Court, a Petition for Rehearing, which said Petition is in the words and figures following, to-wit:

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SEVENTH CIRCUIT.

No. 8249

G. W. BURLEY, ET AL.,
Plaintiffs-Appellants,

vs.

ELGIN, JOLIET AND EASTERN RAILWAY COMPANY, A CORPORATION,
Defendant-Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION,
HONORABLE JOHN P. BARNES, TRIAL JUDGE.

Petition for Rehearing.

PAUL R. CONAGHAN,
208 S. LaSalle St.,
Chicago, Illinois,
Counsel for Defendant-Appellee.

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IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SEVENTH CIRCUIT.

No. 8249

G. W. BURLEY, ET AL.,
Plaintiffs-Appellants,

vs.

ELGIN, JOLIET AND EASTERN RAILWAY COMPANY, A CORPORATION,
Defendant-Appellee.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION,
HONORABLE JOHN P. BARNES, TRIAL JUDGE.

Petition for Rehearing.

Elgin, Joliet and Eastern Railway Company petitions this Court for a rehearing. Your petitioner requests also that oral argument be granted before the matters set forth in this petition shall be determined.

Your petitioner respectfully represents that certain points and authorities set forth in its brief filed herein have been overlooked or misapprehended.

The question of agency in this case was considered by the Court as a question arising at common law. This was an error. The agency question cannot be considered apart from the provisions of the Railway Labor Act. This Act was not considered by the Court in the decision handed down on November 10, 1943. The issues before this Court necessarily involve a construction of that Act and the effect of the award for the defendant made by the administrative Board created by that Act.

Whether the District Court correctly entered summary judgment for the defendant depends upon whether the award of the Adjustment Board is final and binding. The District Court found that the award for the defendant was final and binding *as a matter of law*. That finding was the *ratio decidendi* of its opinion. This Court did not pass upon the issue. If the award of the Adjustment Board is final and binding, the District Court correctly entered summary judgment for the defendant and that judgment should have been affirmed by this Court.

I.

The Award of the Adjustment Board Is Final and Binding.

On pages 16 and 45 of your petitioner's brief and argument, there is set forth the point that the award rendered by the Adjustment Board on September 6, 1940 in favor of the defendant is final and binding upon the plaintiffs in the case at bar. This award (Supp. Tr., 26-39), in Docket 7324, in part found (Supp. Tr., 39) that

> "The evidence shows that the parties to the agreement disposed of the claim here made by the letter of the carrier, dated October 28, 1938, accepted by the employees October 31, 1938.
>
> Award.
>
> Claim denied per Findings."

Section 153 (m) of the Railway Labor Act (45 USCA) provides that

> "the award shall be final and binding upon both parties to the dispute."

As stated on page 48 of your petitioner's brief, authority of the General Chairman of the Grievance Committee to file a complaint before the Adjustment Board in the name of "Brotherhood of Railroad Trainmen" alleging that the defendant violated Article 6 of its labor agreement and claiming for the plaintiffs (among others)

> "one day's pay at time and one-half for . . . each day they were required to work in yard service in the Whiting (Standard Oil Company) yard . . . from the dates of August 27, 1934 until November 14, 1938, inclusive." (Supp. Tr. 26)

is implied because of the very nature of his office and functions in the Brotherhood. All plaintiffs in the case at bar were members of the Brotherhood. (Brief p. 3, Supp. Tr. p. 4.)

The General Chairman of the Grievance Committee of the Brotherhood of Railroad Trainmen, as pointed out on page 48 of your petitioner's brief, had been designated by the plaintiffs as their "representative" to act for them in the presentation of their claim before the defendant and later before the Adjustment Board relating to the alleged violation of Article 6 of the labor agreement. These facts are not denied by plaintiffs. The fact that the second claim filed before the Adjustment Board sought to obtain additional pay at time and one-half for each day worked between August 27, 1934 and November 14, 1938, and that the first claim filed before the Adjustment Board sought only to compel the defendant to comply with the provisions of Article 6 of the labor agreement is immaterial so far as this Court is concerned. This Court is bound by the adjudication of the Adjustment Board deny-

ing the second claim. *Washington Terminal Co.* v. *Boswell*, 124 F. 2d 235; brief p. 51.

Congress has provided specifically for *limited* court review in certain types of disputes arising out of agreements between railroads and labor organizations. *Washington Terminal Co.* v. *Boswell*, 124 F. 2d 235, affirmed, 63 S. Ct. 1430; brief, pp. 16, 17, 18, 51, 57. Congress has not given to courts power to decide jurisdictional controversies between unions and a railroad. *Switchmans Union of North America* v. *National Mediation Board, et al; General Committee of Brotherhood of Locomotive Engineers* v. *M. K. T. R.R. Co.; General Committee of Brotherhood of Locomotive Engineers* v. *Southern Pacific Co., et al*, all decided by the Supreme Court of the United States, November 22, 1943. (See also brief, Point IV. B, p. 53.)

In the latter case, the Court stated:

> "It seems to us plain that when Congress came to the question of these jurisdictional disputes it chose not to leave their solutions to the courts.
>
> "To the contrary, it fashioned an administrative remedy and left that group of disputes to the National Mediation Board . . . The conclusion is irresistible that Congress carved out of the field of conciliation, mediation and arbitration only the select list of problems which it was ready to place in the adjudicatory channel. All else it left to those voluntary processes whose use Congress had long encouraged to protect these arteries of interstate commerce from industrial strife. The concept of mediation is the antithesis of justiciability . . . Courts should not rush in where Congress has not chosen to tread."

In the three opinions handed down November 22, 1943, the Supreme Court decided that in the absence of specific provisions for judicial review, jurisdictional disputes between labor unions and a railroad should be decided by

the Mediation Board established by the Railway Labor Act and that courts have no power to decide such controversies. The same reasoning applies to awards of the Adjustment Board created by the same Act.

There is no provision in the Railway Labor Act by which the award of the Board denying the claim of the plaintiffs in the case at bar might be reviewed by this Court. In the absence of such a provision, this Court has no power to review the award. The plaintiffs in the case at bar are seeking Court review of their claims, a right denied them by the Railway Labor Act. The award of the Board should be given the legal effect directed by Congress—that is, the award "shall be final and binding upon both parties to the dispute" and *upon this Court.*

The award also contains findings of fact (Supp. Tr., 39) as follows:

> "The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe within the meaning of the Railway Labor Act, as approved June 21, 1934.
>
> "This Division of the Adjustment Board has jurisdiction over the dispute involved herein.
>
> "The parties to said dispute were given due notice of hearing thereon."

These findings of fact by the administrative agency satisfied the District Court and should satisfy this Court that the elementary requiremnets of due process, jurisdiction of the dispute and notice to the parties and an opportunity to be heard, so far as the plaintiffs in the case at bar are concerned, were complied with by the administrative agency. This Court is bound by such findings of fact.

When the Adjustment Board handed down its award in the second complaint filed by the Brotherhood in this case denying the claim in accordance with the findings

of fact, this Court was ousted of its jurisdiction because the award of the Board was final and binding. The Chairman of the Grievance Committee of the Brotherhood originalfy could have filed suit for alleged back wages due in accordance with the alleged custom either in a court of law or before the Adjustment Board. (*Moore* v. *Illinois Central*, 312 U.S. 630, brief, pages 36, 50.) When the privilege was exercised by the "designated representative" of the plaintiffs and a claim was filed before the Adjustment Board and the Adjustment Board denied the claim in accordance with the finding of facts, that award of the Adjustment Board has a legal effect binding upon this Court. (*Washington Terminal Co.* v. *Boswell*, 124 F. 2d 235, 244; brief page 52.) In other words, the award of the Adjustment Board is final and binding and this Court cannot ignore the legal consequences of the award by considering this case as one arising as at common law. The question of common law agency is not a justiciable controversy in this case.

II.

The Opinion of This Court Conflicts with Other Federal Court Decisions.

The decision of this Court conflicts with the opinion in the case of *Division 525, Order of Railway Conductors of America* v. *Gorman, et al*, 133 F. 2d 273, CCA 8, 1943; brief, p. 49. This case held that the defendant cannot be required to examine into the specific authority granted the "designated representative" of the Order when entering into a collective bargaining agreement.

The same reasoning applies when the "designated representative" of the Brotherhood and of the plaintiffs in the case at bar made the compromise agreement and presented the claim before the Adjustment Board. The

defendant cannot be required to determine, as the opinion of this Court directs, whether the claim filed in the name of the Brotherhood of Railroad Trainmen by the Chairman of the General Grievance Committee of the Brotherhood was specifically authorized by the plaintiffs. This requirement, as the defendant points out on page 48 of its brief, would destroy collective bargaining made mandatory by the Railway Labor Act. If the Chairman of the Grievance Committee was the "designated representative" of the Brotherhood of Railroad Trainmen and authorized to confer with the defendant, then the defendant is *compelled* (45 USCA sec. 152, second) to "consider" and, if possible, "decide" all disputes. Vagaries of the rules of common law agency need not be considered by the defendant.

If the petition for rehearing in this case is not granted and if your petitioner is required in every case of collective bargaining to determine whether the Chairman of the Grievance Committee of the Brotherhood of Railroad Trainmen has been actually authorized to make the particular agreement concluded, the defendant will be required to obtain specific authority from its thousands of employees in Indiana and in Illinois before it can begin negotiations with the "designated representative." The problem would be even more complex for transcontinental railroads having employees in many states.

If the authority of the "designated representatives" of the employees "to negotiate, compromise and settle plaintiff's claim for damages for the violation of Article 6" is considered as a matter of agency at common law, requiring the defendant to demand strict proof of the agency from all of the employees involved, in this case from all of the plaintiffs and others, collective bargaining will break down. (Brief, pages 32, 33.) Such proof necessarily would be of a nature to satisfy a jury by a preponderance of the evidence or a court as a matter of law that the

"designated representative" was authorized to perform every particular act and enter into every particular agreement consummated. Such requirement, as a practical measure, would result in industrial strife, "interruption to commerce or to the operation" of railroads and bring about the very conditions which the Railway Labor Act sought to prevent.

Nevertheless, such must be the policy of this defendant if this petition for rehearing is not granted. No other course of safe procedure is permitted by the decision handed down by this Court on November 10, 1943. Such detailed requirements would destroy the provisions of the Railway Labor Act and thus nullify the expressed compulsion of Congress that railroads settle disputes with "designated representatives" of labor organizations, either by compromise agreement or by disposition of the Adjustment Board. (Brief, page 32.)

Greater confusion would result with reference to claims filed before the Adjustment Board. This defendant and all railroads, if this petition for rehearing is not granted, will be required to examine into the specific authority of the "designated representative" or proceed at their peril. Frequently claims involve many employees, as in the case at bar. The opinion of this Court requires that the specific authority of the "designated representative" to file a claim before the Adjustment Board for each employee he claims to represent must be shown in a manner to satisfy the common-law rules of agency. Neither the defendant nor any other railroad can follow the decision of this Court and the requirement of the Railway Labor Act to "settle all disputes," if possible, *promptly* with the "designated representative" of the employees, if the opinion of this Court is not reconsidered on rehearing.

The Railway Labor Act merely requires that "failing to reach an adjustment", "the disputes may be referred . . . by either party" to the Adjustment Board, whose

"awards shall be final and binding upon both parties to the dispute." 45 USCA, sec. 153 (i), (m). The opinion of this Court renders these provisionss of the statute nugatory.

This Court overlooked also the case of *Smith et al v. Texas & N. O. R. Co.* (32 F. Supp. 1013, 118 F. 2d 75, CCA 5; brief pages 13, 14, 15, 17, 33, 37) and the case of *System Federation* v. *Louisiana Ry. Co.* (30 F. Supp. 909, 119 F. 2d 509, CCA 5; brief pages 50, 51). In the *Smith* case the employee died six months *before* the execution of the compromise agreement allowing "back wages." If rules of common law agency were applicable, the death of the employee revoked the agency and his children would not have been bound by the provisions of the compromise agreement made by the "designated representatives" during collective bargaining negotiations. The Circuit Court of Appeals, however, held that his children were bound by the agreement. In the *System Federation* case the Circuit Court of Appeals held that "any and all claims for damages" were cancelled by the collective bargaining agreement. Common-law agency rules were not applicable. The same reasoning was applied with approval of the Supreme Court of the U. S. in the case of *Evans et al v. Johnson et al* (300 Ill. App. 78; 20 N. E. 2d 841, cert. denied 309 U. S. 662; brief, page 39), overlooked also by the Court in its opinion of November 10, 1943.

III.

Rules and By-Laws of the Brotherhood Authorized the Compromise Settlement and the Filing of the Claim Before The Adjustment Board.

The Court in its opinion overlooked the rules and by-laws of the Brotherhood, part of the record before the Court. Rule No. 10 in part provides (brief, page 41) "whatever action may be taken by the General Grievance Committee

* * * shall be law to the Lodges * * * and if any member refuses to * * * abide by the action of such General Grievance Committee * * * he shall be expelled from the Brotherhood for violation of obligation."

This rule alone gave the General Chairman and Secretary of the General Grievance Committee of the Brotherhood power to make the compromise agreement of October 31, 1938, and to file the claim before the Adjustment Board.

CONCLUSION.

The plain direction of Congress that the award of the Adjustment Board denying the claim of the Brotherhood for damages for past violations of Article 6 should be "final and binding" upon the plaintiffs in the case at bar was overlooked by the Court in handing down its opinion of November 10, 1943. Admitting that the complaint states a cause of action at common law, the question of the effect of the award upon the rights of the plaintiffs to recover remains unanswered by this Court. Reference to the authority of the agent to bind the plaintiffs not only begs the question but also violates the policy which Congress in the Railway Labor Act provided as paramount.

Whether the award of the Adjustment Board is "final and binding" does not depend upon the niceties of the law of agency. The only question presented to this Court for adjudication, as far as the finality of the award is concerned, is whether the dispute was "referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts" as required by Section 3(i) of the Railway Labor Act, whether the "parties" were heard by their "representatives" and given "due notice" as required by the following paragraph (j), whether "findings" were made in the "final award" as provided in paragraph (k), whether a referee

was chosen as provided in paragraph (l) and whether a "copy of the award" was "furnished to the respective parties to the controversy" as provided in paragraph (m). If these requirements have been met—and plaintiffs admit that they have—then the "award" of the Board "shall be final and binding upon both parties to the dispute" as provided in paragraph (m).

This presents no jury question. Thus, the summary judgment entered by the District Court was correct. It should be affirmed by this Court upon rehearing.

The plaintiffs have had their day. This Court should not give them another. To do so violates the Railway Labor Act and ignores the mandate of Congress. The plaintiffs are prohibited from doing by indirection what the Railway Labor Act denies them to do directly—that is, have a court adjudication after the Adjustment Board has denied their claim. (*Washington Terminal Co.* v. *Boswell*, 124 F. 2d 235; affirmed, 63 S. Ct. 1430; brief, pages 16, 17, 18, 51, 57.)

Furthermore, the decision of this Court conflicts with other Federal decisions and ignores the rules of the Brotherhood granting power to the General Grievance Committee to make a compromise agreement and to file a claim before the Board for "adjustment," as pointed out in this petition.

Rehearing and oral argument should be granted to decide the issues which this Court has overlooked or misapprehended.

Respectfully submitted,

ELGIN JOLIET AND EASTERN RAILWAY COMPANY,
Defendant-Appellee.

PAUL R. CONAGHAN,
Counsel for Defendant-Appellee.
208 S. La Salle St.,
Chicago, Illinois.

Endorsed: Filed November 26, 1943. Kenneth J. Carrick, Clerk.

And afterwards, to-wit: On the fourteenth day of March, 1944, the following further proceedings were had and entered of record, to-wit:

Tuesday, March 14, 1944.

Court met pursuant to adjournment.

Before:

Hon. J. Earl Major, Circuit Judge.
Hon. Otto Kerner, Circuit Judge.
Hon. Sherman Minton, Circuit Judge.

G. W. Burley, *et al.*, *Plaintiffs-Appellants*,	}	Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.
8249 *vs.*		
Elgin, Joliet and Eastern Railway Company, a Corporation, *Defendant-Appellee.*		

It is ordered by the Court that the petition for a rehearing of this cause be, and it is hereby, denied. Judge Kerner does not concur.

And afterwards, to-wit: On the twenty-second day of March, 1944, the Mandate of this Court issued to the District Court of the United States for the Northern District of Illinois, Eastern Division.

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

I, Kenneth J. Carrick, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages contain a true copy of the proceedings had and papers filed, excepting briefs of counsel and motions and orders extending time for filing printed record and briefs, in:

Cause No. 8249

G. W. Burley, *et al.*,
Plaintiffs-Appellants.

vs.

Elgin, Joliet and Eastern Railway Company, a Corp.,
Defendant-Appellee.

as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this 5th day of April, A. D. 1944.

(Seal)

Kenneth J. Carrick
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 9, 1944

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Seventh Circuit is granted, and the case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

Office - Supreme Court, U. S.
FILED
JUN 14 1944
CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943.

No. 160

ELGIN, JOLIET AND EASTERN RAILWAY COMPANY, a Corporation,

Petitioner,

vs.

G. W. BURLEY, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, AND SUPPORTING BRIEF.

PAUL R. CONAGHAN,
Counsel for Petitioner.

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SUBJECT INDEX.

	PAGE
Petition for writ of certiorari	1-14
A. Summary and short statement of the matter involved	2
B. Statement of the basis upon which it is contended that this Court has jurisdiction to reverse the judgment of the Circuit Court of Appeals	4
C. The questions presented	9
D. Reasons relied on for the allowance of the writ	13
Brief in support of petition	15-21
I. Report of opinion	15
II. Statement of grounds on which jurisdiction of this Court is invoked	16
III. Statement of the case	16
IV. Specification of assigned errors intended to be urged	16
V. Argument	17-21
Conclusion	21

TABLE OF CASES CITED.

Alderman et al. v. Elgin, Joliet and Eastern Ry. Co., 125 F. 2d 971	3
Aspen Mining and Smelting Co. v. Billings, 150 U. S. 31	4
Department of Banking v. Pink, 317 U. S. 264	4
Division 25, Order of Ry. Conductors of America v. Gorman et al., 133 F. 2d 273	6, 19

PAGE

TABLE OF CASES CITED (Continued).

General Committee v. M. K. & T. R. R. Co., 64 S. Ct. 146 ..... 6, 13, 18

General Committee v. Southern Pacific R. R. Co., 64 S. Ct. 142 ..... 6, 13, 18

Gypsy Oil Co. v. Escoe, 275 U. S. 498 4

J. I. Case Co. v. National Labor Relations Board, 64 S. Ct. 576 5

Smith et al. v. Texas & N. O. R. Co., 32 F. Supp. 1013, 118 F. 2d 75 ..... 6, 19

System Federation v. Louisiana Ry. Co., 30 F. Supp. 909, 32 F. Supp. 89, 119 F. 2d 509 ..... 6, 19

Switchman's Union of North America v. National Mediation Board, 64 S. Ct. 95 ..... 6, 13, 18

The Order of Railroad Telegraphers v. Railway Express Agency, 64 S. Ct. 582 5

Tunstall v. Brotherhood of Locomotive Firemen and Enginemen et al., 140 F. 2d 35 19

Virginian Ry. Co. v. System Federation No. 40, 131 F. 2d 840, 300 U. S. 515 ..... 6, 8, 19, 20

Washington Terminal Co. v. Boswell et al., 124 F. 2d 235, 63 S. Ct. 1430 ..... 6, 18, 19

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943.

No. .....

ELGIN, JOLIET AND EASTERN RAILWAY COMPANY, a Corporation,

Petitioner,

vs.

G. W. BURLEY, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable, the Supreme Court of the United States:

Your petitioner, Elgin, Joliet and Eastern Railway Company, respectfully represents that it is aggrieved by the final judgment of the United States Circuit Court of Appeals for the Seventh Circuit, entered November 10, 1943 (R. 110), reversing the judgment of the District Court of the United States for the Northern District of Illinois; Eastern Division, and remanding the case with instructions to vacate the summary judgment entered by the District Court in favor of your petitioner (R. 113). Your

petitioner is further aggrieved by the order of the said United States Circuit Court of Appeals entered on March 14, 1944 (Mr. Justice Kerner dissenting), denying the petition for rehearing in this case (R. 129).

A.

Summary and Short Statement of the Matter Involved.

In an amended complaint filed in the District Court of the United States for the Northern District of Illinois, Eastern Division, on the 2nd day of November, 1942 (R. 96), the respondents alleged diversity of citizenship and sought to recover from your petitioner damages for violation of a labor agreement between your petitioner and the Brotherhood of Railroad Trainmen. All respondents were members of the Brotherhood (R. 4). The respondents claim violation of the labor agreement with reference to the starting time of certain crews in the Whiting (Indiana) switch yard of your petitioner and that as a result of such alleged violation, each respondent (R. 5) is "entitled to pay for an additional day, at time and one-half, at the regular daily rate from August 26, 1934, to and including November 14, 1938, for each foreman and each helper, for each day they were required to work in yard service in the 'Whiting Yard' of the defendant, in accordance with the established practice among railroads and employees thereof and as provided in Article 6 of said agreement as aforesaid."

Your petitioner filed a motion to dismiss the original complaint (R. 9-39 inclusive) and also a motion for summary judgment (R. 42). The District Court rendered summary judgment for your petitioner (R. 84), from which an appeal was taken to the Circuit Court of Appeals (R. 85-86).

The Circuit Court of Appeals reversed the judgment of the District Court because of jurisdictional defects relating to diversity of citizenship (*Alderman* v. *Elgin, Joliet and Eastern Railway Company*, 125 F. 2d 971). In its directions, however, the Circuit Court of Appeals permitted the District Court to allow amendments to cure the jurisdictional defects. The amended complaint curing the jurisdictional defects thereafter was filed by the respondents in the District Court (R. 96-98). The District Court again entered summary judgment for your petitioner (R. 99-100). The respondents again appealed to the Circuit Court of Appeals. That Court in its opinion (R. 113) found that the "record affirmatively shows there was an issue of fact" which should have been submitted to the jury and that "the motion for summary judgment should not have been granted" by the District Court. The judgment of the District Court again was reversed and the cause remanded with instructions.

Your petitioner moved to dismiss (R. 9, 99) and for summary judgment (R. 42, 100) for the reasons that (1) the Brotherhood of Railroad Trainmen, the exclusive bargaining representative for the respondents, and of which all of the respondents were members, settled the matter in dispute by written agreement on October 31, 1938 (R. 16-23), (2) the said written agreement released all claims of the respondents against your petitioner arising out of the alleged violation of Article 6 of the labor agreement between the Brotherhood and your petitioner and (3) the decision of the National Railroad Adjustment Board, First Division, on September 6, 1940 (R. 26-39) denying the claim of the Brotherhood for the alleged violation of Article 6 of the labor agreement is "final and binding" upon the respondents.

B.

Statement of the Basis upon Which It Is Contended That This Court Has Jurisdiction to Reverse the Judgment of the United States Circuit Court of Appeals for the Seventh Circuit.

The jurisdiction of this Court to grant this petition for a writ of certiorari is invoked by Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 USCA 347).

The petition for rehearing was denied by the Circuit Court of Appeals (Mr. Justice Kerner dissenting) on March 14, 1944 (R. 129). The time for filing this petition for a writ of certiorari begins from the date the petition for rehearing was denied (28 USCA 350). *Aspen Mining and Smelting Co.* v. *Billings*, 150 U. S. 31; *Gypsy Oil Co.* v. *Escoe*, 275 U. S. 498; *Department of Banking* v. *Pink*, 317 U. S. 264.

The decision of the Circuit Court of Appeals in this case considers only the question of agency existing between the respondents and the representatives of the Brotherhood of Railroad Trainmen as a question arising at common law. This is reversible error. The claims of the respondents against your petitioner cannot rightfully be considered apart from the mandatory provisions of the Railway Labor Act. The opinion of the Circuit Court of Appeals ignored the provisions of that Act. The issues in this case necessarily involve a construction of the Railway Labor Act and the effect of the award for your petitioner made by the Adjustment Board created by that Act.

Whether the District Court correctly entered summary judgment for your petitioner depends upon whether the award of the Adjustment Board is "final and binding."

The District Court found that the award of the Adjustment Board for your petitioner was final and binding *as a matter of law.* That finding was the *ratio decidendi* of its opinion (R. 83). Therefore, in the opinion of the District Court there was no disputable question of fact rightly presented for jury determination. The Circuit Court of Appeals did not even pass upon the issue. If the award of the Adjustment Board is "final and binding" *as a matter of law,* as is expressly provided by the Railway Labor Act (Sec. 153(m) 45USCA), the District Court correctly rendered summary judgment for your petitioner and that judgment should have been affirmed by the Circuit Court of Appeals.

The question whether awards of the Adjustment Board are "final and binding" has not been, but should be, passed upon by this Court. This question is a federal question of substance and of such importance to all of the railroads in the United States and to the proper exercise of jurisdiction by District Courts that this Court should grant this petition for a writ of certiorari.

If the decision of the Circuit Court of Appeals in this case is not reversed, collective bargaining will be destroyed. Railroads will find it impossible to conduct their operations unless they treat directly with their employees regarding matters of grievance, in order to be assured that settlements with the duly authorized representatives of the employees will not be upset by the niceties of the law of agency. Such direct bargaining is demanded by the decision of the Circuit Court of Appeals in this case. The result will be destruction of the policy created by the Railway Labor Act and conflict with the decisions of this Court prohibiting individual dealing with employees as announced in the cases of *The Order of Railroad Telegraphers* v. *Railway Express Agency,* 64 S. Ct. 582 and *J. I. Case Co.* v. *National Labor Relations Board,* 64 S. Ct. 576.

The decision of the Circuit Court of Appeals in this case is not only a decision of a federal question in conflict with the decisions of this Court but also a decision in conflict with decisions of other circuit courts of appeal. (*Washington Terminal Co.* v. *Boswell*, 124 F. 2d 235, CCA-D.C., 63 S. Ct. 1430; *Division 525, Order of Railway Conductors of America* v. *Gorman, et al.*, 133 F. 2d 273, CCA 8, 1943; *Virginian Railway Co.* v. *System Federation No. 40*, 131 F. 2d 840, 844, 300 U. S. 515, 548; *Smith et al.* v. *Texas & N. O. R. Co.*, 32 F. Supp. 1013, 118 F. 2d 75; *System Federation* v. *Louisiana Ry. Co.*, 30 F. Supp. 909, 32 F. Supp. 89, 119 F. 2d 509). The decision sought to be reviewed so far departs from the accepted and usual course of judicial proceedings and thereby so far sanctions such departure by district courts as to demand the exercise of the power of supervision by this Court in granting this petition for a writ of certiorari.

The dispute in this case between the respondents, the Brotherhood of Railroad Trainmen and your petitioner is not unlike a jurisdictional controversy between unions which this Court in *Switchman's Union of North America* v. *National Mediation Board*, 64 S. Ct. 95, *General Committee* v. *Southern Pacific R. R. Co.*, 64 S. Ct. 142, and *General Committee* v. *M. K. & T. R. R. Co.*, 64 S. Ct. 146, held not to be a justiciable controversy within the meaning of the Railroad Labor Act. If courts are without power to declare a union agreement void because the labor union which negotiated it was claimed by the plaintiffs not to be authorized to represent the employees, as in the case of *General Committee* v. *M. K. & T. R. R. Co.*, 64 S. Ct. 146, then courts are without power to adjudicate where, as in this case, a group of employees claim that representatives of the union have exceeded their authority in executing a compromise agreement relating to grievances of the particular group and the Adjustment Board, following

the expressed provisions of the Railway Labor Act, has decided that the compromise agreement made by representatives of the union was a bar to the claims of the particular employees. If the Railway Labor Act prohibits courts from declaring where the jurisdiction of one craft ends and the authority of another begins with respect to the rights of collective bargaining, *a fortiori*, courts have no power to pass upon the question of the limitations, if any, upon the acts of collective bargaining representatives within the unquestioned limitations of the jurisdiction of such representatives after the Railroad Adjustment Board has passed upon the exercise of such jurisdiction, as in this case, and has found that the settlement made by such representatives is conclusive. If courts are without power to adjudicate where the representatives are not authorized by the Mediation Board to represent at all, then courts have no power to declare a settlement agreement void because the representatives have improperly represented a particular group of employees, especially after the Adjustment Board has declared otherwise. If courts may not make a determination between the conflicting claims of labor unions for representation, then the provisions of the Railway Labor Act prohibit the power of courts to be exercised with reference to a particular group of employees within a labor organization, after the Adjustment Board has made its award, except as defined by the procedural sections of the Railway Labor Act.

The question whether authorized representatives of the Brotherhood of Railroad Trainmen or any other labor organization have the power to settle grievances by a written compromise agreement and the power of the Adjustment Board to deny relief, because of such compromise agreement, so that the legal effects of such a settlement and award of the Adjustment Board will be "final and binding" upon the employees and the company, re-

mains unsettled by the decision of the Circuit Court of Appeals in the case at bar. If employees affected by the compromise agreement and award may repudiate such agreement and award and bring suit in their own name against the railroad, the bargaining relating to grievances of necessity will cease to be collective and will be forced to be individual. This will break down the expressed purpose for which Congress passed the Railway Labor Act. (*Virginian Railway Co.* v. *Federation*, 300 U. S. 515, 548.) As a matter of self-protection, railroads will be forced to deal individually with employees regarding matters relating to rules, rates of pay and working conditions, thus violating the policy declared by the Railway Labor Act which imposes "the affirmative duty to treat only with the true representative and, hence, the negative duty to treat with no other" (*Virginian Railway Co.* v. *Federation*, 300 U. S. 515-548).

If your petitioner and other railroads may not treat with authorized representatives of the Brotherhood of Railroad Trainmen or of other unions *unless and until* "the authority of the so-called agents of the plaintiffs to negotiate, compromise, and settle plaintiffs' claims . . ." (opinion of Circuit Court of Appeals, R. 112) has been clearly established with respect to each particular employee affected, the stopping of each collective bargaining conference for the purpose of establishing agency between collective bargaining representatives and each particular employee will render collective bargaining illusory.

If courts by circuitous reasoning may ignore the expressed findings of the Adjustment Board, as did the Circuit Court of Appeals in the case at bar, the policy of Congress "to settle disputes" promptly and to obtain decisions from the Adjustment Board which are "final and binding", as expressed in the Railway Labor Act, is rendered completely ineffective.

This Court should exercise its jurisdiction by granting this petition for a writ of certiorari not merely to determine whether the Circuit Court of Appeals improperly applied principles of common law agency when it should have applied the clear and mandatory provisions of the Railway Labor Act but also for the purpose of pronouncing legal principles that should be applied by all courts when the Adjustment Board has made its award denying a claim presented by the Brotherhood of Railroad Trainmen or any other labor organization, and the railroad contends that the award is "final and binding" in accordance with the provisions of Sec. 153(m) of the Railway Labor Act.

The question presented by this petition is not one of mere applicability of well settled rules of law. The question relates to what basic principles should be applied by courts generally when representatives of a railroad have conferred with representatives of the Brotherhood of Railroad Trainmen or of any other union to settle matters of grievance and settle them by a written agreement, (as found by the award of the Adjustment Board, in accordance with the procedure and provisions of the Railway Labor Act), and, notwithstanding the award of the Adjustment Board, a particular group of employees seek to impose liability upon the railroad by a suit at law, contrary to the provisions of the compromise agreement and the award of the Adjustment Board. This question is substantial and important. It should be finally determined by this Court by granting this petition for a writ of certiorari.

C.

The Questions Presented.

1. Whether Sec. 153 (m) of the Railway Labor Act (45 USCA), which refers to awards of the Adjustment Board, an administrative tribunal created by that Act,

and which in part provides that "the awards shall be final and binding upon both parties to the dispute . . ." apply (to the facts in this case) when representatives of the carrier and the representatives of the Brotherhood have settled a particular dispute by a written compromise agreement (as found by the Adjustment Board), or whether some employees, regardless of such award of the Adjustment Board, have the right to bring suit at law against the carrier because of the same grievance with reference to which the Adjustment Board denied relief.

2. Whether carriers, notwithstanding the provision of the Railway Labor Act imposing the duties upon representatives of the carrier and of the Brotherhood "to settle all disputes" and, as regards the carriers, "to treat" with the designated representatives of the employees, are required at their peril to ascertain that the designated representatives of the employees have been in fact appointed as agents of each particular employee involved in the settlement to make the particular settlement in question.

3. Whether employees of a carrier, notwithstanding the *limited* provisions for court review in the Railway Labor Act and a decision of the Adjustment Board in favor of the carrier, may, nevertheless, obtain *unlimited* court review of the same subject matter of the dispute passed upon by the Adjustment Board by filing in court a separate suit in their own names.

4. Whether designated representatives of employees empowered to act in the presentation of a claim before the Adjustment Board have, by the very nature of their office, implied authority to compromise the claim in such a manner as to bind each and every employee affected by the compromise.

5. Whether courts have power to decide controversies between employees and a railroad (in an independent

action at law for damages arising from alleged violation of the provisions of a labor agreement) when the Adjustment Board, created by the Railway Labor Act, has already passed upon the merits of the dispute and has rendered an award in favor of the railroad.

6. Whether courts are outsted of power to exercise their jurisdiction in a suit filed by employees against a railroad when the Adjustment Board has passed upon the same subject matter of the suit and has rendered an award in favor of the railroad.

7. Whether respondents, who have received an adverse decision by the Adjustment Board and, consequently, are prevented from appealing to the courts from such an adverse award because of the lack of such remedy in the provisions of the Railway Labor Act, and, notwithstanding the provisions of that Act for *limited* court review, my obtain indirectly *unlimited* court review by filing a new suit at law for damages alleging the same facts as submitted to the Adjustment Board for adjudication.

8. Whether awards of the Adjustment Board, not involving money awards, are "final and binding."

9. Whether a jury question is presented when a railroad relies upon an award of the Adjustment Board in its favor and contends that such award is "final and binding" upon the parties and subject matter of the controversy.

10. Whether the rule of the Circuit Court of Appeals in this case that the power of designated representatives to bind employees "depends upon the authority of the so-called agents of the plaintiffs to negotiate, compromise and settle plaintiffs' claims" shall prevail as distinguished from the universal practice of implied authority in matters pertaining to collective bargaining in a case wherein

"the plaintiffs admit they authorized the bargaining agents to negotiate and settle the question of what the defendant was going to do about the observance of Article 6" of the labor agreement (Opinion of Circuit Court of Appeals, R. 112).

11. Whether a railroad which for many years has made many collective bargaining compromise settlements with representatives of the Brotherhood of Railroad Trainmen, may be ordered by a court to set aside a particular compromise agreement, especially after the Adjustment Board has denied the same claim.

12. Whether courts may ignore the "final and binding" consequences of the award of the Adjustment Board relating to the facts and circumstances in this case.

13. Whether there exists jurisdiction by courts to entertain suits filed by employees against a railroad for damages relating to rates of pay and alleged violation of labor agreements, when the Adjustment Board has already decided that these same claims of the employees should be denied.

14. Whether the claims of the respondents in this case were extinguished by the negotiated compromise agreement of October 31, 1938, apart from the subsequent award of the Adjustment Board finding that the claims of the respondents were so extinguished.

15. Whether the complaint presents a claim upon which relief may be granted and whether the judgment of the District Court that it did not is correct.

D.

Reasons Relied upon for the Allowance of the Writ.

The decision of the Circuit Court of Appeals in this case conflicts with decisions of this Court, of other circuit courts of appeal and of other district courts, as pointed out in Part B of this petition. There should be uniformity of decisions relating to the power of courts to exercise jurisdiction after the Adjustment Board has rendered an award, as in this case. The legal consequences resulting from compromise agreements concluded in collective bargaining negotiations and adjudicated by the Adjustment Board should be clear and certain. Furthermore, when such collective bargaining compromise agreements have been executed and when the Adjustment Board created by the Railway Labor Act has denied the claims of certain employees as a result of the execution of such a compromise agreement, this Court should determine whether the award of the Adjustment Board is "final and binding." The District Court found that the award was "final and binding." The Circuit Court of Appeals did not even refer to the issue in the case.

The lack of the power of courts to pass upon union jurisdictional issues decided by the Mediation Board created by the Railway Labor Act has been clearly delineated by the decisions of this Court in *Switchman's Union of North America* v. *National Mediation Board*, 64 S. Ct. 95, *General Committee* v. *Southern Pacific R. R. Co.*, 64 S. Ct. 142, and *General Committee* v. *M. K. & T. R. R. Co.*, 64 S. Ct. 146.

The lack of power of courts or the extent of such power and the limit of its exercise, when there is an issue of the award of the Adjustment Board being "final and binding," presents questions of importance to railroads and

to labor unions. The legal consequences of an award of the Adjustment Board under the facts and circumstances in this case likewise present substantial questions of importance.

All railroads and labor unions seek guidance. This Court should clarify the many existing uncertainties and conflicts by granting this petition for a writ of certiorari.

Respectfully submitted,

ELGIN, JOLIET AND EASTERN RAILWAY COMPANY, *Petitioner.*

PAUL R. CONAGHAN,
Counsel for Petitioner.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943.

No. .....

ELGIN, JOLIET AND EASTERN RAILWAY COMPANY, a Corporation,

Petitioner,

vs.

G. W. BURLEY, *et al.*,

Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Report of Opinion.

The opinion of the Circuit Court of Appeals (R. 110-113) is reported in 140 F. 2d 488.

II.

Statement of the Grounds on Which Jurisdiction of This Court Is Invoked.

The jurisdiction of this Court is invoked in accordance with the provisions of Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 USCA 347) and as more particularly set forth in Part B of the preceding petition.

III.

Statement of the Case.

A concise statement of the case is made in the preceding petition under Part A.

IV.

Specification of Errors Assigned and Intended to be Urged.

The Circuit Court of Appeals erred:

1. In reversing the judgment of the District Court and remanding this case to the District Court with instructions.

2. In not affirming the judgment of the District Court in favor of your petitioner.

3. In omitting to pass upon or make any reference to the issue in this case as to whether awards of the Adjustment Board are "final and binding."

4. In exercising its jurisdiction in any respect with reference to the suggested issues. When the Adjustment Board entered its award and denied the claim of the Brotherhood under the facts and circumstances in this

case, the award of the Adjustment Board is "final and binding." Courts lack power to consider as issues *de novo* in a new suit at law the same issues presented before the Adjustment Board.

5. In rendering its decision that whether collective bargaining agents of the Brotherhood of Railroad Trainmen, who for many years have acted for the employees of your petitioner in conducting collective bargaining negotiations, must present to your petitioner evidence of "the authority of the so-called agents of the plaintiffs to negotiate, compromise or settle plaintiffs' claims . . ."

6. In holding that there was presented in this case a disputable question of fact for jury determination when the Adjustment Board had previously passed upon the same issues and rendered its award denying relief.

7. In omitting to find *as a matter of law* that the award of the Adjustment Board was "final and binding" upon the respondents.

V.

ARGUMENT.

A.

The Adjustment Board in its award denied the claim of the Brotherhood for pay at time and one-half from August 27, 1934 until November 14, 1938. That award of the Adjustment Board is final and binding upon the respondents.

The claim of the Brotherhood of Railroad Trainmen filed before the Adjustment Board on behalf of the respondents in this case (all members of the Brotherhood)

was for the alleged violation by your petitioner of Article 6 of its labor agreement with the Brotherhood and for

> "one days' pay at time and one-half for . . . each day they were required to work in yard service in the Whiting (Standard Oil Company) Yard . . . from the dates of August 27, 1934, until November 14, 1938, inclusive" (R. 26).

The Adjustment Board rendered its award (R. 26 to 39 inclusive) and denied the claim (R. 39). The issue is whether the respondents (as individuals) for the same alleged violation and the same claims (R. 5, 98) may obtain court adjudication by filing an independent action at law in the District Court alleging diversity of citizenship and damages in excess of $3000 for each respondent and also whether the award of the Adjustment Board may be urged as a bar.

Your petitioner contends that under such facts and circumstances, courts have no power to exercise their jurisdiction. The Railway Labor Act expressly limits the power of courts directly or indirectly to review decisions of the Adjustment Board. (*Washington Terminal Company* v. *Boswell, et al.*, 124 F. 2d 235, affirmed 63 S. Ct. 1430.) Congress has not given to courts the power to decide jurisdictional controversies between unions and railroads (*Switchman's Union of North America* v. *National Mediation Board*, 64 S. Ct. 95, *General Committee* v. *Southern Pacific R.R. Co.*, 64 S. Ct. 142, *General Committee* v. *M. K. & T. R. R. Co.*, 64 S. Ct. 146. Neither has Congress given to courts the power to exercise their jurisdiction after the very same issues have been decided by the Adjustment Board in favor of the railroad relating to the facts and circumstances in this case. When Congress stated in Section 153(m) of the Railway Labor Act (45 USCA) that awards of the Adjustment Board shall be "final and binding," provided they are not money

awards, and provided no court review of such awards when they were in favor of the railroad, the expressed intention of Congress is clear that the existence of jurisdiction by courts generally to entertain other forms of suit on the same issues is denied. *Tunstall* v. *Brotherhood of Locomotive Firemen and Enginemen, et al.*, 140 F. 2d 35; *Virginian Railway Co.* v. *System Federation No. 40*, 131 F. 2d 840, 844, 300 U. S. 515, 548; *Smith et al.* v. *Texas & N. O. R. Co.*, 32 F. Supp. 1013, 118 F. 2d 75; *Division 25, Order of Ry. Conductors of America* v. *Gorman, et al.*, 133 F. 2d 273; *System Federation* v. *Louisiana Ry. Co.*, 30 F. Supp. 909, 32 F. Supp. 89, 119 F. 2d 509, and *Washington Terminal Co.* v. *Boswell*, 124 F. 2d 235, 63 S. Ct. 1430.

Even if courts generally have power to exercise jurisdiction in such cases, courts shall not ignore awards of the Adjustment Board (as did the Circuit Court of Appeals in this case) and must effectuate the clear mandate of Congress as set forth in Sec. 153(m) of the Railway Labor Act that awards of the Adjustment Board are "final and binding." *As a matter of law*, this major issue takes precedence over ancillary issues, real or imagined, which may be before the court for adjudication. When a motion for summary judgment is presented, under such circumstances, the first and *only* question for the court to decide is the manner in which the award of the Adjustment Board may be made "final and binding," as demanded by the Railway Labor Act. This the Circuit Court of Appeals failed to do in the case at bar. For that reason your petitioner prays that a writ of certiorari be issued.

B.

The Decision of the Circuit Court of Appeals Conflicts with the Decisions of this Court and of Other Circuit Courts of Appeal.

In part B of the preceding petition there is pointed out the conflict of the decision of the Circuit Court of Appeals in this case with the decisions of this Court and of other circuit courts of appeal. There should be no such conflict on a question of such importance. This Court should obviate the cause for diversity of opinions by granting the petition for a writ of certiorari in this case.

C.

The Decision of the Circuit Court of Appeals Destroys Collective Bargaining.

There is set forth in part B of the preceding petition, also, the point that if the decision of the Circuit Court of Appeals is not reversed, collective bargaining between representatives of railroads and unions will be destroyed. If railroads in every case must apply common law principles of agency and be certain of "the authority of the so-called agents of the plaintiffs to negotiate, compromise and settle plaintiffs' claims . . ." (Opinion, R. 112), bargaining of necessity will become individual and cease to be collective. The result will violate the provisions of the Railway Labor Act making collective bargaining mandatory. The result also will be contrary to the decisions of this Court that the railroads must treat with the designated representative of the employees and imposing the duty "to treat with no other." (*Virginian Railway Co. v. Federation*, 300 U. S. 515.) For this reason alone, the petition for a writ of certiorari should be granted in this

case before the effect of the decision of the Circuit Court of Appeals becomes general.

CONCLUSION.

Apart from the history of the Railway Labor Act, statutory construction and the legalistic argument that might be urged, the judgment of the Circuit Court of Appeals in this case should be reviewed by certiorari because of a "practical concept of what is just."

Furthermore, the harm which will be done by that decision in creating greater confusion among the circuit and district courts regarding the construction of the Act, in subjugating to courts the principles which Congress clearly stated to be immune and independent of judicial legislation, in passing over the terminal point where disposition should be finally made of grievances and the opening of a new field of procedure after processing before the Adjustment Board, in relegating to mere disputation the question whether awards of the Adjustment Board are "final and binding" and in the erosion of true collective bargaining by the impact of technical rules of agency—impel the conclusion that in this case certiorari should be granted.

Respectfully submitted,

PAUL R. CONAGHAN,
Counsel for Petitioner.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1944

No. 160

ELGIN, JOLIET AND EASTERN RAILWAY COMPANY,
a Corporation,
Petitioner,

vs.

G. W. BURLEY, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Brief for Petitioner.

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SUBJECT INDEX.

	PAGE
Report of Opinion	1
Jurisdiction	2
Statement of the case	2
Specification of assigned errors	8
Summary of argument	9
Argument	12
A. The award of the Adjustment Board of September 6, 1940 denied the claim of the Brotherhood for additional pay at time and one-half from August 27, 1934 until November 14, 1938. That award is final and binding upon the respondents	12
B. The collective bargaining agreement of October 31, 1938, signed by the President of the petitioner and the General Chairman and Secretary of the Brotherhood, deprived the respondents of all claims against the petitioner for the alleged violation of Article 6 of the labor agreement	21
C. Courts should not exercise jurisdiction in the case at bar because the respondents failed to exhaust their remedies before the tribunals of the Brotherhood for the alleged want of authority of the Brotherhood officials in executing the compromise agreement of October 31, 1938	28
D. The District Court correctly entered summary judgment for the petitioner	29
E. No question is presented arising under the due process clause of the Fifth Amendment to the Federal Constitution	35
Conclusion	37

PAGE

Table of Cases.

Alabama Independent Service Station Assn., Inc. v. Shell Petroleum Corp., 28 F. Supp. 386 31

Alderman v. E. J. & E. Ry. Co., 125 F. 2d 971 ..... 3, 13, 14

Berryman v. Pullman Co., 48 F. Supp. 542 16

Brisbin v. Brotherhood of Ry. Clerks (Sup. Ct. Nebr.) 279 N. W. 277 29

Central Mexico Light & Power Co. v. Munch, 116 F. 2d 85 30

Division 525, Order of Ry. Conductors of America v. Gorman, et al., 133 F. 2d 273 (C.C.A. 8th, 1943) 19, 26, 29

Donovan v. Travis, et al. (Sup. Jud. Ct. of Mass. 1934) 285 Mass. 167, 188 N. E. 705 26

Estes, et al. v. Union Terminal, 89 F. 2d 763 15

Evans, et al. v. Johnston, et al. (App. Ct. Ill. 1939) 300 Ill. App. 78 29

Ex Parte Peterson (1920) 253 U. S. 300 35

Fidelity and Deposit Co. v. U. S. (1920) 187 U. S. 315 35

Franklin v. Pennsylvania-Reading, 122 N. J. Equity 205, 193 A. 712 (1937) 29

General Investment Co. v. Interborough Transit (1923) 235 N. Y. 133, 139, N. E. 216 35

Mallory v. Carroll, 272 Mass. 524; 172 N. E. 790 28

Moore's Federal Practice Under the New Federal Rules, Vol. 1 (1938) 29

Moore's Federal Practice Under the New Federal Rules, Vol. 3 (1938) 34

Moore v. Illinois Central Railroad Co., 312 U. S. 630, 756 36

Palmer v. Palmer, 31 F. Supp. 861 (March 4, 1940) 31

Port of Palm Beach District v. Goethals, (C.C.A. 5th, 1939) 104 F. 2d. 706 35

PAGE

TABLE OF CASES (continued).

Samara v. United States (C.C.A. 2d, 1942) 129 F. 2d 594 32

Smith, et al. v. Texas & N. O. R. Co. (D.C.W.D. La. May 9, 1940) 32 F. Supp. 1013, affirmed 118 F. 2d (C. C. A. 5th, March, 1941) 26

Snay v. Lovely, 276 Mass. 159; 176 N. E. 791 28

System Federation v. Louisiana Ry. Co., 30 F. Supp. 909 26

Victory v. Manning, 128 F. 2d 415 33

Virginian Railway Co. v. Federation, 300 U. S. 515, 548 20

Virginian Railway Co. v. System Federation No. 40 (U.S.C.A. 4th, Nov., 1942) 131 F. 2d 840, 844 ..... 18, 20

Washington Terminal Co. v. Boswell, 124 F. 2d 235 ..... 15, 36

STATUTES CITED.

The Railway Labor Act, 45 USCA, Sec. 152 ..... 20, 22

The Railway Labor Act, 45 USCA, Sec. 153 ..... 9, 13, 14, 21, 35

IN THE

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OCTOBER TERM, A. D. 1944

No. 160

ELGIN, JOLIET AND EASTERN RAILWAY COMPANY, a Corporation,

Petitioner,

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Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR PETITIONER.

I.

Report of Opinion.

The opinion of the Circuit Court of Appeals (R. 110-113) is reported in 140 F. 2d 488.

II.

Statement of the Grounds on which Jurisdiction of this Court is Invoked.

The jurisdiction of this Court is invoked in accordance with the provisions of 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 USCA 347), as more particularly set forth in Part B of the petition for a writ of certiorari filed herein.

III.

Statement of the Case.

In an amended complaint filed in the District Court of the United States for the Northern District of Illinois, Eastern Division, on November 2, 1942 (R. 96), the ten respondents alleged diversity of citizenship and that the petitioner violated Article 6 of the labor agreement for yardmen between the petitioner and the Brotherhood of Railroad Trainmen. The damages alleged by each respondent varied from $3,500.00 to $14,000.00. The total *ad damnum* was $65,274.00 (R. 98). All respondents were yardmen employed by the petitioner and members of the Brotherhood of Railroad Trainmen (R. 4).

The complaint alleged that the petitioner ordered its train crews to commence work in the Whiting (Indiana) switch yard either before or after the times specified in the labor agreement (R. 4) for starting train crews and that as a result of these alleged violations, each respondent (R. 5) is "entitled to pay for an additional day, at time and one-half, at the regular daily rate from August 26, 1934, to and including November 14, 1938, for each foreman and each helper, for each day they were required to work in yard service in the 'Whiting Yard' of the defendant, in accordance with the established practice

among railroads and employees thereof, and as provided in said Article 6 of said agreement as aforesaid."

The petitioner filed a motion to dismiss the original complaint (R. 9-39 inclusive) and also a motion for summary judgment (R. 42). The District Court rendered summary judgment for the petitioner (R. 84), from which an appeal was taken to the Circuit Court of Appeals (R. 85-86).

The Circuit Court of Appeals reversed the judgment of the District Court because of jurisdictional defects relating to diversity of citizenship (*Alderman* v. *Elgin, Joliet and Eastern Railway Company*, 125 F. 2d 971). In its directions, however, the Circuit Court of Appeals permitted the District Court to allow amendments to cure the jurisdictional defects. The amended complaint curing the jurisdictional defects thereafter (November 2, 1942) was filed by the respondents in the District Court (R. 96-98).

The District Court again entered summary judgment for the petitioner (R. 99-100). The respondents again appealed to the Circuit Court of Appeals. That Court in its opinion now before this Court for review (R. 110-113) found that the "record affirmatively shows there was an issue of fact" which should have been submitted to the jury and that "the motion for summary judgment should not have been granted" by the District Court. The judgment of the District Court again was reversed and the cause remanded with instructions (R. 113).

For many years prior to 1934, the intra-plant switching of Standard Oil Company refineries at Whiting, Indiana was performed by train crews employed by that company. On July 27, 1934, and subsequently to date, this intra-plant switching was performed by the petitioner. Yard crews employed by Standard Oil Company prior to July 27, 1934, were ordered to commence work each day at hours fixed in advance by plant management. These hours

varied from time to time, according to the demands of manufacturing operations (R. 32-33). Crews employed by the petitioner at all yards in Indiana and Illinois commenced work each day at hours which had been fixed many years prior to 1934, as set forth in Article 6 of the labor agreement between the petitioner and the Brotherhood for yardmen relating to "rules", working conditions and "rates of pay" (R. 4).

On November 23, 1936, the Brotherhood of Railroad Trainmen, the designated representative of all of the yardmen employed by the petitioner, filed a complaint before National Railroad Adjustment Board alleging that the petitioner had violated Article 6 of the labor agreement (R. 13). This complaint was assigned by the Board as Docket No. 3537 (R. 14).

On October 28, 1938, the President of the petitioner "settled" twenty-four "cases" or grievances with the designated representatives of the Brotherhood of Railroad Trainmen, after collective bargaining conferences with them as required by the provisions of the Railway Labor Act. These conferences were required also by the provisions of the labor agreement between the petitioner and the Brotherhood. The letter of the President of the petitioner (R. 16-23) proposing settlement and compromise of these cases, some of which were then pending before the National Railroad Adjustment Board, included Case No. 5, Board Docket No. 3537, the claim of the Brotherhood that Article 6 of the labor agreement had been violated.

That letter of settlement and compromise "accepted for the yardmen" on October 31, 1938, by the General Chairman and Secretary of the Brotherhood (R. 23), in part provided:

> "Case No. 5—Labor Board docket No. 3537—Starting Time of Switch Engines in Whiting S. O. Yard.
>
> "Settled by agreement that the starting times, for a ninety day trial period commencing November 15th,

1938, shall be the times provided for in Article 6 of the Yardmen's Agreement instead of the starting times heretofore agreed upon and now being followed. If at the end of the ninety day trial period the Railway Company or its employes claim that the starting times as fixed in Article 6 do not result in efficient and economical operation and in satisfaction to our employes and to the industry served, then representatives of the Railway Company and representatives of the Yardmen and representatives of the Engineers and representatives of the Firemen will sit down and work out a schedule of starting time best suited for meeting the special requirements of the industry. (R. 17.)

* * * * *

"We have by this letter given you a complete resume of all of the claims which have not heretofore been disposed of, filed by you on behalf of the employees whom you represent and have proposed in this letter a very liberal disposition of all of the cases involved. The settlements proposed are predicated on a complete settlement and withdrawal of all cases now pending either before the Board, or under discussion with this office except Case No. 4, which it is understood will be left to a decision by the National Railroad Adjustment Board, and it is further understood that in the event these settlements are accepted that the claims listed in this letter cover all claims of a similar nature, and that no other claims covering the same or like situations will be presented when such claims arise from causes occurring prior to the date of this settlement.

Yours truly,

(Signed) S. M. Rogers,
President.

Accepted for the Yardmen: Oct. 31, 1938
(Signed) C. H. Williams,
General Chairman, B. of R. T.

(Signed) S. F. Johnson,
Secretary, B. of R. T."
(R. 23.)

On the same day, a letter was addressed to the Secretary of the National Railroad Adjustment Board by the President of the petitioner and the General Chairman of the Brotherhood (R. 24-25) advising the Board that certain cases then pending before it "have been settled and we, therefore, jointly request that they be withdrawn from the Docket of the Board (R. 24)." Included in the cases pending before the Board which the parties agreed had been "settled" and which the parties requested be withdrawn from the docket of the Board, was the case represented by the Board's Docket No. 3537 (R. 24), the claim of the Brotherhood that Article 6 of the labor agreement had been violated. On the same day, the President of the petitioner, Mr. A. F. Whitney, President of the Brotherhood, and the General Chairman of the Brotherhood were advised by the Board (R. 25-26) that Case No. 3537 and others were removed from the docket as requested.

Notwithstanding the execution of the settlement agreement on October 31, 1938, and the dismissal of the claim of the Brotherhood that the petitioner had violated Article 6 of the labor agreement, then pending before the Board, by a joint letter to the Board advising it that the case had "been settled" (R. 24), the Brotherhood on April 18, 1939 filed a second complaint before the Board (R. 71). This complaint was docketed as Case No. 7324 (R. 69) and in part stated: "Claim for one day's pay at time and one-half for each foreman and each helper for each day they were required to work in yard service in the Whiting (Standard Oil Company) Yard, in violation of the fixed starting time provided for in Article No. 6 of the Yardmen's Agreement of the Elgin, Joliet & Eastern Railway Company, effective January 1, 1927, and applicable to Whiting (Standard Oil Company) Yardmen; July 27, 1934, from dates of August 27, 1934, until November 14, 1938, inclusive" (R. 71).

On September 6, 1940, the Board in Docket No. 7324 issued its findings and award (R. 26-39) in part as follows:

"The evidence shows that the parties to the agreement disposed of the claim here made by the letter of carrier dated October 28th, 1938, accepted by employes October 31, 1938.

AWARD.

Claim denied per Findings.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of First Division
Attest: (Sgd.) T. S. McFARLAND,
Secretary."
(R. 39.)

On November 19, 1940, the respondents filed their complaint in the District Court of the United States for the Northern District of Illinois, Eastern Division, subsequently amended as aforesaid.

The petitioner moved to dismiss (R. 9, 99) and for summary judgment (R. 42, 100) in the District Court for the reasons that (1) the Brotherhood of Railroad Trainmen, the exclusive bargaining representative for the respondent yardmen, and of which all of the respondents were members, "settled" the matter in dispute by the written agreement on October 31, 1938 (R. 16-23), (2) the said written agreement "accepted for the yardmen" released all claims of the respondents against the petitioner arising out of the alleged violations of Article 6 of the labor agreement between the Brotherhood and the petitioner and (3) the decision of the National Railroad Adjustment Board, First Division, on September 6, 1940 (R. 26-39) denying the claim of the Brotherhood filed for the benefit of the yardmen for the alleged violation of Article 6 of the labor agreement is "final and binding" upon the respondents.

IV.

Specification of Errors Assigned and Intended to be Urged.

The Circuit Court of Appeals erred:

1. In reversing the judgment of the District Court and in remanding this case to the District Court with instructions.

2. In not affirming the judgment of the District Court in favor of the petitioner.

3. In omitting to pass upon or make any reference to the issue in this case as to whether the award of the Adjustment Board is "final and binding."

4. In exercising its jurisdiction in any respect with reference to the suggested issues. When the Adjustment Board entered its award and denied the claim of the Brotherhood under the facts and circumstances in this case, the award of the Adjustment Board is "final and binding." The District Court in the new suit at law for damages lacked power to consider issues *de novo*.

5. In rendering its decision that whether collective bargaining agents of the Brotherhood of Railroad Trainmen, who for many years prior to and at the times in question were the exclusive designated representatives of the yardmen of the petitioner in conducting collective bargaining negotiations, must present to the petitioner evidence of "the authority of the so-called agents of the plaintiffs to negotiate, compromise or settle plaintiffs' claims . . . ."

6. In holding that there was presented in this case a disputable question of fact for jury determination when the Adjustment Board previously had rendered its award denying the same claims presented for the yardmen now respondents in this case.

7. In omitting to find *as a matter of law* that the award of the Adjustment Board was "final and binding" upon the respondents.

V.

The Summary of Argument.

The award of the Adjustment Board of September 6, 1940 denied the claim of the Brotherhood for additional pay at time and one-half for each day worked from August 27, 1934 until November 14, 1938. That award is final and binding upon the respondents, the petitioner and the District Court in this proceeding. Section 153 (m) of the Railway Labor Act (45 USCA) provides that such awards "shall be final and binding upon both parties to the dispute, except insofar as they shall contain a money award." The award of the Board was not a money award because it did not include "a requirement for the payment of money" as stated in Section 153 (o) of the Act.

The claim before the Board was the same as the liability predicated in the complaint in the case at bar. Neither the claim filed before the Board nor the complaint filed in the District Court assert liability for overtime or back wages. The respondents were paid for the time worked. The claims relate only to *penalty* damages.

All procedural requirements of the Railway Labor Act were followed. The respondents were heard before the Board by their designated representatives. The District Court had no power to exercise its jurisdiction. By the Railway Labor Act, Congress deprived courts of power to pass upon issues in this case. Summary judgment for the defendant was correctly entered by the District Court. This Court should affirm.

The authority of the Brotherhood Chairman to file the claim before the Board is granted to him by the provisions of the Railway Labor Act as a designated representative of the respondents. That authority is not limited by technical rules of agency, as stated in the opinion of the Circuit Court of Appeals. Thus there was no issue of fact for jury determination. The Railway Labor Act removed the issue from the scope of court adjudication. The award of the Board is the terminal point of the grievance and is "final and binding" upon this Court in this case.

The collective bargaining agreement of October 31, 1938, signed by the President of the petitioner and the General Chairman and Secretary of the Brotherhood, deprived the respondents of all claims against the petitioner for the alleged violation of Article 6 of the labor agreement. If the respondents in this case, more than two years after the execution of this compromise agreement, may deny the authority of their designated representatives to act for them in the execution of this agreement and present this issue as a justiciable controversy, as in the case at bar, after the Adjustment Board has examined the compromise agreement and given legal effect to it, then collective bargaining is meaningless and the Railway Act is "a dead letter." Neither the rules and the by-laws of the Brotherhood nor the by-laws and resolutions if adopted by the Board of Directors of the petitioner can limit the mandatory provisions of the Railway Labor Act or nullify compromise agreements executed by designated representatives of the respondents and of the petitioner, in accordance with the provisions of the Act.

The labor agreement between the petitioner and the Brotherhood provided that "any controversies arising as to the application of the rules herein agreed upon . . . shall be taken up . . ." by the General Committee with the General Superintendent, "and in the event of their failure

to agree upon a satisfactory settlement, the Committee may appeal to the Vice President." Thus, the petitioner was required by its labor agreement as well as by the Railway Labor Act to treat only with the General Committee of the Brotherhood after the grievances had been appealed to the General Superintendent or to the Vice President.

The Court should not exercise jurisdiction in this case because the respondents failed to exhaust their remedies before tribunals of the Brotherhood relating to the alleged want of authority of the Brotherhood officials in executing the compromise agreement of October 31, 1938 and in filing the claim before the Board upholding that collective bargaining agreement. The failure of the respondents to exhaust their remedies before the Brotherhood tribunals prevents court adjudication.

The District Court correctly entered summary judgment for the petitioner. The law is clear that the District Court has the right to consider facts presented by affidavits or exhibits in support of a motion to dismiss and in support of a motion for summary judgment. There was no question regarding the truth of these affidavits and exhibits. *Their truth is admitted.*

There is no question arising under the due process clause of the Fifth Amendment. The respondents could have filed an action in court and could have obtained judicial determination of the issues presented. The fact that they did not elect to do so does not present a constitutional question for this Court to determine. Furthermore, by collective bargaining, all claims of the respondents for a violation of Article 6 of the labor agreement were extinguished by the compromise agreement of October 31, 1938. Therefore, the complaint in the case at bar did not state a cause of action upon which relief could be granted. This presents no constitutional question. The District Court correctly entered summary judgment for the petitioner.

VI.

ARGUMENT.

A.

The award of the Adjustment Board of September 6, 1940 denied the claim of the Brotherhood for additional pay at time and one-half from August 27, 1934 until November 14, 1938. That award is final and binding upon the respondents.

All respondents in this case are members of the Brotherhood (R. 4). The Brotherhood claimed that the petitioner violated Article 6 of its labor agreement relating to yardmen and on April 18, 1939, asked the Board (R. 71) to enter an award for

> "one day's pay at time and one-half for each foreman and each helper for each day they were required to work in yard service in the Whiting (Standard Oil Company) Yard, in violation of the fixed starting time provided for in Article 6 of the Yardmen's Agreement of the Elgin, Joliet and Eastern Railway Company, effective January 1, 1927, and applicable to Whiting (Standard Oil Company) Yardmen, July 27, 1934, from the dates of August 27, 1934, until November 14, 1938, inclusive.".

This claim is the same as the liability predicated by the complaint in the case at bar.

The respondents were paid for the time worked. The claim filed before the Board and the complaint filed in the District Court assert no liability for overtime or back wages. Each seeks *penalty* damages (R. 80, 83).

After briefs were filed by the Brotherhood and by the petitioner, the Board, on September 6, 1940, entered its award (R. 26-39) which concluded (R. 39) as follows:

> "The evidence shows that the parties to the agreement disposed of the claim here made by the letter of carrier dated October 28th, 1938, accepted by employes October 31, 1938.
>
> Award.
>
> Claim denied per Findings."

The petitioner claims that this award is "final and binding" upon the respondents in this case and a bar to their recovery. Furthermore, it deprives courts of jurisdiction.

The Circuit Court of Appeals in its opinion (R. 110-113) did not pass upon these issues, although requested to do so.

The District Court, however, found (R. 83) that

> "there was no adverse relationship between the Brotherhood and these plaintiffs in that proceeding before the Board, and I think that the controversy was submitted to the Board, that it had jurisdiction and that it was decided, and that the plaintiffs were represented there and were bound thereby. . . . I think the ruling of the Adjustment Board was binding upon the plaintiffs as well as upon the defendant and that it is binding upon this court in this proceeding."

The Railway Labor Act, 45 USCA, Section 153(m) in part provides:

> "The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the dispute, except insofar as they shall contain a money award."

The award of the Adjustment Board was not a "money award" within the meaning of the Railway Labor Act.

The award did not direct the petitioner to pay money. Paragraph (o) of the same section of the Railway Labor Act in part provides that:

> "if the award includes a requirement for the payment of money", "the division of the Board shall make an order, directed to the carrier, to make the award effective and . . . to pay to the employee the sum to which he is entitled under the award on or before a day named."

The Railway Labor Act itself clearly indicates that a "money award" is an award which "includes a requirement for the payment of money" and that *if the award does not include such a requirement*, it is not a "money award" within the meaning of paragraph (m) of the Act.

Section 153 (i) of the Railway Act provides:

> "The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes."

Paragraph (j) of the same section provides that the parties may be heard either in person, by counsel, or by "other representatives, as they may respectively elect . . ."

Paragraph (k) in part provides:

> "That final awards as to any such dispute must be made by the entire division as hereinafter provided."

Paragraph (l) provides that upon failure of any division to agree upon an award because of a deadlock or inability to secure a majority of the members, a referee may be selected "to sit with the division as a member thereof and make an award." Such an award was made in the case at bar.

Full compliance was made with all procedural requirements of the Railway Labor Act. The respondents in the case at bar were heard before the Board by their designated representatives, as provided by the Act. Notice to the duly constituted officers of the Brotherhood is sufficient to bind the respondents. *Estes, et al.*, v. *Union Terminal Co.*, 89 F. 2d 768. Therefore, the award of the Board is "final and binding" upon the petitioner and the respondents here.

The respondents, however, seek to obtain indirectly what the Railway Labor Act prohibits. There is no provision in the Act for court review of an award of the Board when that award is in favor of the carrier and in opposition to the claims of the employees. The clear intention of Congress is that there should be no court adjudication or review, directly or indirectly, in such a case (*Washington Terminal Company* v. *Boswell, et al.*, 124 F. 2d 235, affirmed 319 U. S. 732). The Court (124 F. 2d 235) at page 244 stated:

> "We think, therefore, that Congress intended the Board to be and to act as a public agency, not as a private go-between; its awards to have legal effect, not merely that of private advice. It intended the employees, when successful before the Board, to have definite and substantial probative and financial advantages in suits to enforce awards, which they cannot have in other suits. Because this is so, and because the Act gave the employees two years in which to sue for enforcement, we think Congress intended the courts during that period to keep hands off these controversies except in the manner specified in the

> Act. This would be true if it were necessary to regard the issue now presented as involving the existence of jurisdiction to entertain other forms of suit. It is equally true, when the issue is considered as presenting a question of sound judicial discretion in declining to exert jurisdiction, more especially since this is a suit for a declaratory judgment. To permit maintenance of this suit would short-circuit both the administrative proceeding and the special statutory suit. It would make the Railway Labor Act a dead letter so far as legal effect is concerned, perhaps also as a 'voluntary, private system of negotiation.' So far as the intention of Congress goes, therefore, we cannot believe these results were contemplated."

In the case of *Berryman* v. *Pullman Co.*, 48 F. Supp. 542, a discharged Pullman porter, through the designated representatives of the Brotherhood of Sleeping Car Porters, presented his claim for back wages and reinstatement to the officials of the company and then to the Adjustment Board, as required by the Railway Labor Act. The Adjustment Board denied the plaintiff's claim. This award was claimed by the defendant in a motion for summary judgment to have finally settled the controversy. The Court at page 543 stated:

> "The award of the Adjustment Board contained no money award. It did determine that plaintiff was discharged because of and as a result of his own misbehavior. That finding is made final by the statute. There is no room for a subsequent inquiry into the same question by the Courts. But by the present action plaintiff seeks to have the Court do just that. He voluntarily submitted the dispute to the Adjustment Board, got its decision and cannot now ignore it."

The motion for summary judgment for the defendant was sustained.

To permit courts generally to exercise their jurisdiction after the Board has entered its award in favor of the

railroad and against the Brotherhood representing the yardmen in circumstances similar to the case at bar not only would violate the clear provisions of the Act but also would disregard the legislative history of that Act and the preceding legislation. The first act dealing with railway labor in 1888 and all subsequent legislation prior to the 1934 amendments to the Railway Labor Act of 1926 contain no provision which made awards of adjustment boards final and binding. (See first annual report of the National Mediation Board, including the report of the National Railroad Adjustment Board for the fiscal year ended June 30, 1935.)

The 1934 amendments creating the National Railroad Adjustment Board and paragraph (m) in question indicated the clear intention of Congress that when the claim of the designated representatives of a class or craft of employees could not be "adjusted" with officers of the railroad and when such a claim was "referred" to the Adjustment Board, and the Board handed down its award denying the claim, such award was intended to be "final and binding upon both parties to the dispute."

No procedure for court review is provided for by the Act. It is clear, therefore, that in such a case Congress intended that the award of the Board should be the terminal point of the grievance. If the respondents in the case at bar may now obtain unlimited court adjudication of their claims by a trial *de novo*, the expressed intention of Congress will be nullified.

Since the award of the Board in this case is "final and binding", it follows that the District Court had no power to exercise its jurisdiction. As stated by the District Court, the award of the Board was binding upon that Court "in this proceeding.". By the Railway Labor Act, Congress deprived courts of power to pass upon issues in the circumstances of the case at bar. Therefore, there was no

issue of fact for jury determination. As a matter of law, the Railway Labor Act has made the award of the Board "final and binding." All issues in this case are thereby removed from court adjudication. The summary judgment for the defendant was rightly entered by the District Court and should be affirmed.

The respondents claim that the Chairman of the Brotherhood exceeded his authority in filing the claim before the Board on April 18, 1939. The prior claim (Docket No. 3537) filed by him with the Board on November 23, 1936 (R. 13, 14), "settled" on October 31, 1938, and then withdrawn from the docket of the Board, they admit was filed by the Brotherhood Chairman with their authority (R. 48). However, the second claim was "referred" to the Board by the Brotherhood Chairman in the same manner as many prior claims against the petitioner had been "referred" by him to the Board. The Secretary of the Board followed his customary practice and on May 18, 1939, gave notice to the President of the petitioner and also to Mr. A. F. Whitney, President of the Brotherhood, that the claim was "referred" to the Board (R. 69).

Ostensible authority should guide the Board and this Court in reviewing the actions of the Brotherhood Chairman. Furthermore, by paragraph (i) of the Act, hereinbefore quoted, the Brotherhood Chairman is granted authority to refer the dispute to the Board for its award.

In *Virginian Railway Co.* v. *System Federation No. 40*, 131 F. 2d 840, 844, the Court stated:

> "Indeed, Congress, by the terms, philosophy and history of the Act, seems to have turned to the representatives (which are normally labor unions) of the employees as the usual agents for attempting to settle controversies arising under the Act and for enforcing the awards of the Board. Again, the analogy of the National Labor Relation Act, 29 U.S.C.A. § 151 *et seq.*, has persuasive force here."

In the case of *Division 525, Order of Ry. Conductors of America* v. *Gorman, et al.*, 133 F. 2d 273, the Court at page 278 stated:

> "The defendants assert that they have dealt with the designated representative of the Order, that they did this in entering into the contract of March 3, 1941, and they dealt with the same designated representative when they entered into the contract of November, 1941; terminating the contract, and that having so done they have complied with the law and that they had a right to assume that O. L. Coulter, the general Chairman, was acting with full authority and that agreements with him were valid. They say: 'If such an agreement can be set aside by individual lodges or members of the Order, then railroads can never enter into an agreement with the Order as bargaining agent and the whole system of collective bargaining on the part of the employees, provided by the Railway Labor Act, will de destroyed.'
>
> It appears without dispute that the defendants have dealt with the representative of the Order in effecting the collectively bargained agreements, and they cannot be required to examine into the specific authority granted the representative of the Order."

If the petitioner is required to act at its peril regarding the authority of the General Chairman of the Brotherhood to represent the yardman, for whom he is the designated representative within the meaning of the Railway Labor Act, then the question of specific instructions by employees to the designated representative will be present in every case "referred" to the Board and also in every case "handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes," as provided in paragraph (i).

If the authority of the designated representative is questionable by either the employees or the employer in every case "referred" to the Board and in every step

of the grievance procedure, collective bargaining made mandatory by the Railway Labor Act will be destroyed. The result will be that the petitioner and other railroads may not "treat" with the designated representatives of the Brotherhood or of other unions, unless and until "the authority of the so-called agents of the plaintiffs to negotiate, compromise and settle plaintiffs' claims for damages for the violation of Article 6" or for the alleged violation of any labor agreement has been clearly established regarding respective amounts claimed by each particular employee affected, as required by the opinion of the Circuit Court of Appeals (R. 112).

The stopping of each collective bargaining conference for the purpose of establishing agency between the designated representatives and the particular employees and the delay in each proceeding "referred" to the Board, for the purpose of establishing this agency and the scope of authority of the designated representatives, will necessarily make collective bargaining too complicated for administration and illusory. Apart from the administrative difficulties, the mandatory provisions of the Act, as regards the petitioner "imposes the affirmative duty to treat only with the true representative, and, hence, the negative duty to treat with no other." (*Virginian Railway Co.* v. *Federation*, 300 U. S. 515, 548.) In addition, the Act (45 USCA 152, Second) imposes the duty upon the petitioner and the designated representatives to consider and, if possible, to decide all disputes "with all expedition."

Furthermore, Rule No. 10 of the "Constitution and General Rules of the Brotherhood of Railroad Trainmen" presented to the District Court for its consideration prior to ruling on the motions to dismiss and for summary judgment, and presented also to the Circuit Court of Appeals, provides in part that:

"Whatever action may be taken by the General Grievance Committee or Board of Adjustment of any system within the meaning of the above General Rules shall be law to the Lodges on that road until *and unless reversed by the* Board of Appeals, and if any member refuses to vote or abide by the action of such General Grievance Committee or Board of Adjustment, he shall be expelled from the Brotherhood for violation of obligation."

Therefore, the ostensible authority of the Brotherhood Chairman in filing the claim before the Board, Section 153 (i) and (m) of the Railway Labor Act and Rule No. 10 of the Brotherhood authorized the filing of the claim before the Board on April 18, 1939. The subsequent award of the Board denying relief is final and binding upon the respondents, the petitioner and the courts in this proceeding.

B.

The collective bargaining agreement of October 31, 1938, signed by the President of the petitioner and the General Chairman and Secretary of the Brotherhood, deprived the respondents of all claims against the petitioner for the alleged violation of Article 6 of the labor agreement.

The pertinent provisions (R. 17, 23) of the collective bargaining agreement are set forth on pages 4 to 5 of this brief.

This compromise agreement is typical of collective bargaining required by the Railway Labor Act. The agreement made final disposition of thirty-eight cases, some of which had been referred to the Board by the Brotherhood. Approximately seventy-two employees benefited by the settlements. All cases relate to rates of pay, rules and working conditions. The intention of the parties as expressed in the agreement is clear and unambiguous.

The agreement was intended to be "a complete settlement" of case No. 3537 then pending before the Board and provided "that no other claims covering the same or like situations will be presented when such claims arise from causes occurring prior to the date of the settlement."

On the date of its execution, the parties advised the Board that the case docketed as No. 3437 had been "settled" and jointly requested that it be withdrawn from the docket of the Board (R. 24). The President and General Chairman of the Brotherhood and the President of the petitioner were thereupon advised by the Secretary of the Board that the case had been withdrawn from the Board's docket (R. 25).

In addition to the parties advising the Board that the case docketed as No. 3537 had been "settled," the Board itself, in the award of September 6, 1940 (R. 26-39), found that the compromise agreement of October 31, 1938 disposed of all claims filed on April 18, 1939 (R. 71), by the designated representative of the respondents in Board's Docket No. 7324. These claims are the same as those presented by the respondents in the case at bar. The finding of fact by the Board to the effect that the parties "disposed of the claim here made by the letter of the carrier, dated October 28, 1938, accepted by the employees October 31, 1938" (R. 39) is binding on courts in this proceeding.

The Railway Labor Act (45 USCA 152) in part provides:

> "First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of

any carrier growing out of any dispute between the carrier and the employees thereof.

. . . . .

"Second. All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

. . . . .

"Sixth. In case of a dispute between a carrier or carriers and its or their employees, arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, it shall be the duty of the designated representative or representatives of such carrier or carriers and of such employees, within ten days after the receipt of notice of a desire on the part of either party to confer in respect to such dispute, to specify a time and place at which such conference shall be held: . . . . .

. . . . .

"Eighth. Every carrier shall notify its employees by printed notices in such form and posted at such times and places as shall be specified by the Mediation Board that all disputes between the carrier and its employees will be handled in accordance with the requirements of this chapter, . . . The provisions of said paragraphs are hereby made a part of the contract of employment between the carrier and each employee, and shall be held binding upon the parties, regardless of any other express or implied agreements between them.

. . . . .

"Tenth. The willful failure or refusal of any carrier, its officers or agents, to comply with the terms of the third, fourth, fifth, seventh, or eighth paragraph of this section shall be a misdemeanor, and upon conviction thereof the carrier, officer, or agent offending

shall be subject to a fine of not less than $1,000, nor more than $20,000, or imprisonment for not more than six months, or both fine and imprisonment, for each offense, and each day during which such carrier, officer, or agent shall willfully fail or refuse to comply with the terms of said paragraphs of this section shall constitute a separate offense. . . ."

Thus, in executing the compromise agreement of October 31, 1938, the parties merely carried out the duties imposed upon them by the Act "to settle all disputes" "concerning rates of pay, rules, and working conditions," and that all "disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference by the representatives designated and authorized so to confer. . . ."

The petitioner, its officers or agents are subject to severe fines and imprisonment, or both, for each offense each day the petitioner, its officers or agents wilfully fail or refuse to comply with the duties imposed by section 152 of the Act. If the carrier, as the petitioner here, concludes a collective bargaining agreement with the designated representatives of the employees and more than two years later those employees, as the respondents here, may deny the authority of the designated representatives to act for them in the execution of the agreement and if they may litigate the claim in courts after the Adjustment Board has denied them, collective bargaining is meaningless and the Railway Labor Act is "a dead letter." The rules and by-laws of the Brotherhood, even if they did apply to the actions of the General Chairman and Secretary of the Brotherhood in this case, cannot limit the compulsory requirements of the Act. Nor could a by-law or resolution of the Board of Directors of the petitioner limit them. The mandatory provisions of the Act are supreme.

Article 25 of the agreement between the petitioner and its yardmen requires that "any controversies arising as

to the application of the rules herein adopted" shall be taken up by the "General Committee" of the Brotherhood. Thus, treating with the designated representatives is required by the collective bargaining agreement as well as by the Railway Labor Act.

The labor agreement between the defendant and the Brotherhood (Exhibit "H," filed in the District Court and in the Circuit Court of Appeals), upon which the plaintiffs predicate liability, refers to the procedure for the "handling" of grievances. Local lodges or local grievance committees of the Brotherhood have no authority to "take up" grievances with the General Superintendent or the Vice President of the defendant. By the terms of the labor agreement, this power is given only to the General Grievance Committee of the Brotherhood on the Elgin, Joliet and Eastern Railway System, of which C. H. Williams was General Chairman and S. F. Johnson was Secretary. These persons in their official capacities signed the compromise agreement of October 31, 1938.

The defendant is bound by the provisions of its labor agreement with the Brotherhood and by the provisions of the Railway Labor Act. The compulsory provisions of that Act requiring the defendant "to settle all disputes," if possible, with the designated representatives of the Brotherhood culminated in the settlement agreement of October 31, 1938. This was in compliance with the provisions of the labor agreement and of the Act. The award of the Board found that the agreement "disposed" of the claims upon which the respondents now seek to recover. The claims of the respondents asserted more than two years after the execution of the compromise agreement cannot override the provisions of the labor agreement between the petitioner and the Brotherhood that grievances "shall be taken up" by the General Committee and not by the respondents individually. Nor can they override

the duties imposed by the Railway Labor Act upon the petitioner and the respondents' designated representatives "to settle all disputes."

In *Donovan* v. *Travers, et al.* (Sup. Jud. Ct. of Mass. 1934), 285 Mass. 167, 188 N. E. 705, the Court at page 707 stated:

> "The substantial issue is whether the rights of the plaintiffs are fixed by the terms of the agreement between the union and the railroad as it stood when the several plaintiffs entered upon their service interpreted only in the light then available; or whether as the agreements changed from time to time, the modifications and possible changes in interpretation of terms agreed upon by the union and the railroad modified and affected the individual contracts of those already in the railroad's employ. We think the latter to be the proper position. The transaction is an agreement between an employer and a labor union designed by the latter to benefit itself and those members who enter the employer's service. The employee stands no higher than the union. If it modifies the agreement with the employer, the employee must acquiesce. In no correct sense is the union an agent. It is a principal."

When a compromise agreement is executed with the designated representatives of the employees, all employees, as the respondents here, are bound thereby. *Smith et al.* v. *Texas & N. O. R. Co.*, 32 F. Supp. 1013, 118 F. 2d 75; *Division 525, Order of Railway Conductors* v. *Gorman et al.*, 133 F. 2d 273; *System Federation* v. *Louisiana Ry. Co.*, 119 F. 2d 509.

In the *Smith* case, the agent-telegrapher's children sought to recover from the railroad back wages due the agent-telegrapher who died while his designated representatives were negotiating a compromise agreement. Subsequent to his death, the agreement was concluded providing for pay-

ment of wage losses for those "who now hold the status of employees." The Court at page 1014 states:

> "the plaintiffs now before us and of age, neglected to advise and consult with the representatives of the Order of Railroad Telegraphers before the compromise agreement was had, with the view of protecting specially the rights, if any, of their deceased father. The jurisprudence is persuasive that they were on notice and were represented; and, therefore, their rights were decided at the compromise between the employees as a group and the carrier."

The employee died six months *before* the execution of the compromise agreement allowing back wages. If the rules of common law agency were applicable, as held by the Circuit Court of Appeals in the case at bar, death of the employee revoked the agency and his children would not have been bound by the provisions of the compromise agreement made by the "designated representatives" during collective bargaining negotiations. The Circuit Court of Appeals, however, held that his children were bound by the agreement. The defendant's motion to dismiss was sustained.

This Court should effectuate the intention of the parties as expressed in the compromise agreement of October 31, 1938 to settle all claims relating to Article 6 and providing that "no other claims covering the same or like situations will be presented when such claims arise from causes occurring prior to the date of this settlement." Apart from any provisions of the Railway Labor Act, the compromise agreement in question arrived at through collective bargaining requires that the claims of the respondent be denied and that the summary judgment entered for the petitioner by the District Court be affirmed.

C.

Courts should not exercise jurisdiction in the case at bar because the respondents failed to exhaust their remedies before the tribunals of the Brotherhood for the alleged want of authority of the Brotherhood officials in executing the compromise agreement of October 31, 1938.

The respondents filed no proceeding before the Adjustment Board to vacate the award of the Board dated November 6, 1940, on account of the alleged want of authority of the Brotherhood officials in filing the complaint in docket No. 7324, or on account of the want of authority by the Brotherhood officials in executing the negotiated compromise agreement of October 31, 1938.

Neither did the respondents file any proceeding before the Brotherhood officials, in accordance with the provisions of the constitution and by-laws of the Brotherhood, seeking to have nullified the authority exercised by the Brotherhood officials in execting the negotiated compromise agreement and subsequently filing a claim before the Adjustment Board in docket No. 7324. Rule 10 attached to the Brotherhood Constitution provides for an appeal to the various tribunals existing for that purpose created by the Brotherhood for any member who is not satisfied with any action taken by the Grievance Committee.

The failure of the respondents to exhaust the remedies open to them within the Brotherhood before seeking relief in court for any wrong alleged to have been committed by the officials of the Brotherhood prevents court adjudication. *Mallory* v. *Carroll* (Supreme Judicial Court of Massachusetts, 1930) 172 N. E. 790, 272 Mass. 524; *Snay* v. *Lovely, et al.* (Supreme Judicial Court of Massachusetts, 1931) 176 N. E. 791; 276 Mass. 159.

The respondents are estopped from repudiating the negotiated compromise agreement of October 31, 1938. *Brisbin* v. *Brotherhood of Railway Clerks* (Supreme Court of Nebraska, 1938) 279 N. W. 277; *Division 525, Order of Ry. Conductors* v. *Gorman, et al.*, 133 F. 2d 273; *Evans, et al.* v. *Johnson, et al.*, 300 Ill. App. 78, 20 N. E. 2d 841, certiorari denied, 309 U. S. 662; *Franklin, et al* v. *Pennsylvania-Reading*, 122 N. J. Eq. 205, 193 A. 712.

D.

The District Court correctly entered summary judgment for the petitioner.

The law is clear that the District Court has the right to consider facts presented by affidavits or exhibits in support of a motion to dismiss and in support of a motion for summary judgment. In the case at bar, there was no question regarding the truth of the facts set forth in the petitioner's affidavits and exhibits. *Their truth is admitted.*

Civil Procedure Rule 12 (b) provides:

> "Every defense, in law or *fact* . . . shall be asserted in the responsive pleading thereto *if one is required*, except that the following defenses may at the option of the pleader be made by motion: (1) Lack of jurisdiction over the subject matter, . . . (6) Failure to state a claim upon which relief can be granted." (Italics ours.)

The law is clear that affidavits may be considered in support of a motion to dismiss. *Moore's Federal Practice Under the New Federal Rules*, Vol. 1, states at page 646:

> "It is to be noted that Equity Rule 29 authorized only defenses in point of *law arising upon the face of the bill* to be made by motion. On the other hand

> Rule 12 (b) authorizes *every* defense in law *or fact* to be made in the responsive pleading, and then authorizes certain of those defenses to be first made by motion, if the party is so advised. The scope of Rule 12 (b) is as broad as the field of defense. Unless a motion may be accompanied by affidavit or make reference to depositions on file in the case its utility is seriously impaired. . . . It would be quibbling to hold that Rule 12 (b) does not authorize a motion raising defense (6) to be accompanied by an affidavit that the statute of limitations had run, or that the claim was barred by *res judicata*."

Rule 6 (b) of the District Court relates to the service of evidentiary matter in support of or in opposition to motions and clearly contemplates the filing of evidentiary matter in support of a motion to dismiss. Rule 6 (b) in part provides:

> "In serving notice of a motion in support of which *evidentiary matter* is required or intended to be submitted . . . copies thereof shall be served with the notice. Parties opposing the motion shall serve and file . . . *any evidentiary matter or affidavits upon which they intend to rely.*" (Italics ours.)

The Circuit Court of Appeals for the Second Circuit in the case of *Central Mexico Light & Power Co.* v. *Munch*, 116 F. 2d 85, decided that affidavits may be received on a motion to dismiss for want of jurisdiction, and whether the motion is called a motion to dismiss or a motion for summary judgment is not important since the same relief is sought. The court at p. 87 stated:

> "Moreover, in two separate affidavits, he raised the question of jurisdiction, and in one he asked specifically for dismissal on that ground. Plaintiffs' suggestion that Munch is not relying upon this objection surely is not well taken, nor is plaintiffs' objection that the motion to dismiss of the other defendants came too late. It is not important whether

the objection is called a motion to dismiss or one for summary judgment. Since the same relief is sought the difference in name is unimportant. In any event, the affidavits presented are available on either motion."

Mr. Justice Clark in *Palmer* v. *Palmer*, 31 F. Supp. 861, at p. 863, stated:

"The present proceedings arise on defendants' motion for judgment on the pleadings and motion for summary judgment. These are presented as two separate motions, the former dealing only with issues of law on the pleadings and the latter only with whether there were any triable issues of fact in view of the affidavits filed. I see no occasion for treating them as thus distinct. Both motions seek a single relief, judgment for the defendants; in granting that relief I feel I am justified in relying on any or all appropriate grounds disclosed by any or all the papers of record in the case. *United States Trust Co. of New York* v. *Sears*, D. C. Conn., 29 F. Supp. 643, 645."

In the footnote on p. 863 the Court stated:

"If these various motions must be kept in separate compartments, then little has been gained by the abolition of the demurrer, for a hierarchy of objecting proceedings, each calling for separate procedural steps and formal hearings, will then still persist. Logically but one relief is sought; as a matter of practical convenience all appropriate reasons therefor should be advanced and considered as a single step."

The District Court for the Northern District of Alabama in the case of *Alabama Independent Service Station Assn., Inc.* v. *Shell Petroleum Corp.*, 28 F. Supp. 386, at p. 388 stated:

"At this point it may be worth while to advert to the question whether facts appearing in affidavits, depositions and answers to interrogatories may be

considered in the disposition of a motion to dismiss. Rule 12 (b) of the Rules of Civil Procedure provides that 'every defense, in law or fact, to a claim for relief in any pleading . . . shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter . . . (6) failure to state a claim upon which relief can be granted . . .' This rule differs significantly from the former Equity Rule 29 in that the latter provided only for 'every defense in point of law arising upon the face of the bill' by motion. We are of the opinion that the affidavits, depositions and answers to interrogatories may be considered here on all the motions, the latter being within the terms of Rule 12 (b) defenses in law *and* fact."

Petitioner's motion to dismiss the complaint may be treated as a motion for summary judgment. Facts set forth in the motion or in documents accompanying the motion need not be sworn to for the purpose of receiving the consideration of the Court.

In the case of *Samara* v. *United States*, Circuit Court of Appeals, Second Circuit, 129 F. 2d 594, the Court at p. 597 stated:

"Upon the trial of his action the question will arise whether he is limited to the evidence presented to the Commissioner. If the present record fairly presents such question, judicial economy will obviously be served by an immediate decision rather than by remanding the case for trial. We think the question is fairly presented, since the defendant's motion to dismiss may be treated as one for dismissal under Rule 12(b) (6) for failure to state a claim, or one for summary judgment under Rule 56(b). See Federal Rules of Civil Procedure, Rules 12 and 56, 28 U.S.C.A. following section 723(c). The new rules have been held to authorize 'speaking' motions, and thus permit the allegations of the complaint to be

supplemented by the certified copies of the claim for refund and the letters of the Commissioner, annexed to the motion, the correctness of which is not disputed. See *Gallup* v. *Caldwell*, 3 Cir., 120 F. 2d 90, 92; *Cohen* v. *American Window Glass Co.*, 2 Cir., 126 F. 2d 111, 114."

In the case of *Victory* v. *Manning*, 128 F. 2d 415, the defendant filed a motion to dismiss and attached to his motion photostatic copies of letters unaccompanied by any affidavits. The Circuit Court of Appeals, Third Circuit, held this to be proper and at p. 417 stated:

"However, we find no requirement either in the Federal Rules of Civil Procedure or in the Rules of the District Court of New Jersey that facts alleged in motions and not otherwise appearing of record should be sworn to or contained in an affidavit. The general tenor of the Rules, as they pertain to this question, indicates, rather, that the use of affidavits under such circumstances is discretionary with the parties or the court. Certainly, since a fact can be alleged in a motion, without verification, there would be little logic, in the absence of a specific rule to the contrary, to require the exhibits accompanying that motion to be under oath. The waiver was therefore properly before the court in this case."

Civil Procedure Rule 56 (b) clearly provides that a defendant may file a motion for summary judgment "at any time. . . . with . . . supporting affidavits. . . ."

Civil Procedure Rule 56 (c) provides that "the judgment sought *shall* be rendered forthwith if the pleadings . . . together with the affidavits . . . show that . . . there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Italics ours.)

Civil Procedure Rule 56 (e) relates to the form of affidavits and further testimony in support of a motion for summary judgment for the defendant.

Moore's Federal Practice Under the New Federal Rules, Vol. 3, (1938) states at page 3181:

> "A defending party may move for summary judgment at any time after a pleading stating a claim against him is served upon him. He is not required to serve his responsive pleading first. There is no necessity for a time limitation upon the making of a motion by a defending party, as his motion is directed at the claim and his defenses will appear in his supporting affidavit or other evidence. A typical instance where a defendant may move for summary judgment before serving his answer is when he admits the facts stated in the complaint but asserts the statute of limitations as a defense. Similarily, a defending party may make the motion before answer in any case where his defense involves only a question of law. And he may also make the motion before answer where he can show that the complaint is without merit or that he has a defense which will clearly defeat the claim asserted against him."

On page 3185 the authors, citing many cases, state:

> "Where there is no genuine issue of fact, the court is required by Rule 56 (c) to render summary judgment in favor of the moving party if he is entitled thereto as a matter of law. The existence of an important, difficult, or complicated question of law, where there is no issue as to the facts, is not a bar to a summary judgment. Rule 56 (c) clearly contemplates and requires that the court render summary judgment in such a situation."

On page 87 of the supplement to Volume 3, the authors cite many cases in point and state:

> "Similarly, where it appears from the affidavits, pleadings or depositions that there are no issues of fact, and the issues of law resolve themselves in favor of the defendant, a summary judgment may be entered on the defendant's motion."

The summary judgment procedure outlined in Rule 56 is a procedural device for promptly disposing of actions in which there is no genuine issue as to any material fact. The purpose is to eliminate a trial in such cases, since a trial is unnecessary and results in delay and expense. To attain this end, the rule permits a party to pierce the allegations of fact in the complaint and to obtain relief by summary judgment when the facts set forth in detail in affidavits and exhibits and admissions show there are no genuine issues of fact to be tried. [*Moore's Federal Practice*, Vol. 3(1938) pages 3174-5.] Thus, the District Court examines evidence not to try an issue but to determine where there is a genuine issue of fact proper for trial.

Summary judgment procedure does not infringe the constitutional right of a party to a jury trial.

Fidelity and Deposit Co. v. *U. S.* (1902) 187 U. S. 315.

Ex Parte Peterson (1920) 253 U. S. 300.

General Investment Co. v. *Interborough Transit* (1923) 235 N. Y. 133, 139 N. E. 216.

Port of Palm Beach District v. *Goethals*, (CCA 5th, 1939) 104 F. 2d 706.

E.

No question is presented arising under the due process clause of the Fifth Amendment to the Federal Constitution.

The respondents claimed in the court below that Section 153 (m) of the Railway Labor Act which provides that awards of the Board are final and binding upon both parties to the dispute, except insofar as they shall contain a money award, violates the due process law of

the Fifth Amendment to the Constitution. The respondents point out that if they obtain an award of the Board and the carrier refuses to make payment, the employees may file a suit for enforcement in the District Court. In that proceeding, the carrier may present evidence regarding any defense and in effect obtain judicial review of the decision of the Board on the merits of the case.

No corresponding right is given by the Railway Labor Act to the carrier to file a suit in the District Court when the award of the Board is in favor of the carrier. Nor have the respondents the right to judicial review when the Board's award is in favor of the carrier. Neither can the carrier obtain judicial review or court determination if the award of the Board is in favor of the employees and the employees do not seek enforcement in a suit filed in the District Court. *Washington Terminal Railway v. Boswell, et al.*, 124 F. 2d 235.

The petitioner contends that the negotiated compromise agreement of October 31, 1938 is an effective agreement and extinguished the claims asserted by the respondents in this case. For that reason, the District Court had no power to exercise its jurisdiction and this Court is not called upon to consider the constitutional question. The complaint filed by the respondents in the District Court failed to state a claim upon which relief can be granted and, therefore, the District Court correctly entered summary judgment for the petitioner. The constitutional question is moot.

Furthermore, the respondents in the first instance were not required to present their claims before the Adjustment Board. They could have directed their designated representatives to file a complaint in court and, thereby, obtain judicial determination of their claims. *Moore v. Illinois Central Railroad*, 312 U. S. 630. The failure of

the respondents to elect to obtain court adjudication in the first instance presents no constitutional question in this case.

CONCLUSION.

The award of the Board entered November 6, 1940 is final and binding upon the respondents, the petitioner and the courts in accordance with the provisions of the Railway Labor Act. The District Court had no power to exercise its jurisdiction. The complaint filed by the respondents did not state a claim upon which relief could be granted. Summary judgment was correctly entered by the District Court for the petitioner. Furthermore, apart from any provision in the Railway Labor Act, the collective bargaining agreement of October 31, 1938 extinguished all claims of the respondents for the alleged violation of Article 6 of the labor agreement. This Court should effectuate the intention of the parties at the time the agreement was executed. This presents no facts for jury determination. The judgment of the District Court should be affirmed.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1944

No. 160

ELGIN, JOLIET AND EASTERN RAILWAY COMPANY,
a Corporation,
Petitioner,

vs.

G. W. BURLEY, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Reply Brief for Petitioner.

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SUBJECT INDEX.

	PAGE
Summary of Argument	1-3
Argument	4-14
A. The award of the Adjustment Board of September 6, 1940 denied the claim of the Brotherhood for additional pay at time and one-half from August 27, 1934 until November 14, 1938. That award is final and binding upon the respondents	4-10
B. No question is presented arising under the due process clause of the Fifth Amendment to the Federal Constitution	10-13
Conclusion	14

TABLE OF CASES CITED.

Baltimore and Ohio Railroad Co., et al. v. Brady, 288 U. S. 448, 457	9
Corrigan, et al. v. Buckley, 271 U. S. 223	9, 13
Griffin v. Chicago Union Station, 13 F. Supp. 722	8
Hardware Dealers Mutual Fire Insurance Company v. Glidden Co., 284 U. S. 151	13
I. C. C. v. United States, 289 U. S. 385, 394	9
L. & N. R. Co. v. Greene, 244 U. S. 522	13
Luckenbach S. S. Co. v. United States, 272 U. S. 533	13
Moore v. Illinois Central Railroad Co., 312 U. S. 630	9, 13
National Labor Relations Board v. Jones and Laughlin Steel Corporation, 301 U. S. 1, 46	13
Nord v. Griffin, 86 F. 2d 481	8

PAGE

TABLE OF CASES CITED (Continued).

Plymouth Coal Company v. Pennsylvania, 232 U. S. 531, 547 13

Reetz v. Michigan, 188 U. S. 505 13

System Federation v. Louisiana and A. Railway Co., 32 F. Supp. 89, 90 16

Teague v. Brotherhood of Locomotive Firemen, 127 F. 2d 58 13

United States v. Heinze, 218 U. S. 532 13

Virginian Railway Co. v. System Federation, No. 40, 300 U. S. 515, 558, 559 ..... 13, 14

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SUMMARY OF ARGUMENT.

The Railway Labor Act imposes upon the parties a new terminology and new concepts. It compels the performance of new duties. It creates rights and privileges for employees and their designated representatives. It blocks out the nomenclature of the common law.

The authority of designated representatives to act is not specifically delegated by respondents. That authority springs from the Railway Labor Act. In like manner, that authority cannot be limited by lack of specific directions from respondents or by rules and by-laws of the Brotherhood, to which the respondents belong.

Designated representatives of the employees have power to change labor agreements. The Act so provides. Designated representatives also have power by the Act "to settle all disputes" and "with all expedition". Designated representatives have power by the Act, also, to compromise grievances, as was done in the case at bar in the execution of the compromise agreement of October 31, 1938.

Collective bargaining compromise agreements are not required to meet the technical requirements of consideration necessary for contracts of common law. The only requisite is that such agreements express the intention of the parties. This was done by the compromise agreement of October 31, 1938. The Adjustment Board so found in its award.

There is no dispute in the case at bar that the parties who executed this agreement were the designated representatives nor is there any dispute that the designated representative who filed the claim before the Adjustment Board was the proper representative to file such a claim. The Railway Labor Act gave this representative power to "refer" the claim to the Board, if he so elected. The fact that the claims may affect the "personal" or "individual" rights of the respondents does not destroy the final and binding effect of the award of the Board.

The final and binding provision in the Act, paragraph (m), should be construed to read that non-money awards of the Board shall be final and binding upon both parties to the dispute except insofar as the Act otherwise provides and except insofar as the constitution prohibits. The

respondents are forced to take the position that if there is an award of the Board against the employees or their designated representative, the employees can "disregard" the award because "it is of no effect whatsoever." This construction opposes the clear expression by Congress that awards shall be final and binding. The Senate and House reports at the time of the adoption of the 1934 amendments refer not only to a "compulsory" system of "adjudication" but also to the requirement that the Board shall "hear and decide" the disputes.

Paragraph (m) does not deny respondents due process of law required by the Fifth Amendment. Respondents and the designated representatives have the right to file a suit at law for damages and there obtain due process. If the designated representative elects to file a claim before the Board, the respondents are bound thereby and cannot (after the award of the Board issues against them) claim that the election of their designated representative deprives them of due process.

The argument that the respondent would have "a right of review" by courts if the award of the Board was in favor of the employees ignores the provision in paragraph (p) that enforcement proceedings in the District Court by petition are permissive only. The employees *may* file the petition but are not required by paragraph (p) to file it. The Fifth Amendment is a limitation upon the powers of the Federal Government. It is not directed against the election made by a designated representative not to have court adjudication of claims of the respondents. Therefore, the lack of due process argument does not apply.

ARGUMENT.

A.

The award of the Adjustment Board of September 6, 1940, denied the claim of the Brotherhood for additional pay at time and one-half from August 27, 1934 until November 14, 1938. That award is final and binding upon the respondents.

Throughout the brief for respondents there occur frequently the terms "release", "*res judicata*", Brotherhood as "agents" of the respondents, Brotherhood officials acting within scope of "authority," "valid consideration," "no consideration," and "meeting of the minds". This nomenclature of the common law is blocked out by the Railway Labor Act. The Act imposes on the parties a new terminology and new concepts. It compels the performance of new duties. It creates new rights and privileges for employees and their designated representatives.

The authority of the designated representatives to act is not specifically delegated by respondents. That authority springs from the Railway Labor Act. In like manner, that authority cannot be limited by lack of specific directions from respondents or by rules and by-laws of the Brotherhood, to which the respondents belong.

To permit such a limitation would destroy the powers granted to the designated representatives by Congress. The rules and by-laws of the Brotherhood can no more limit the compulsory requirements of the Act (Petitioner's brief, p. 24) than could by-laws or resolutions of the Board of Directors of the petitioner limit them. The mandatory provisions of the Act are supreme.

Respondents argue (brief, p. 14):

> "We submit that no rights of the members can be alienated without the member's consent, as the 'Board' and the lower Court did in the instant case."

Again (brief, p. 16) respondents argue:

> "Certainly, the right to damages is as valuable as a seniority right, and we believe the court should not fail to follow these decisions in holding that a union, nor its officials, cannot waive or destroy it."

The Act itself (45 USCA 152, Seventh) provides for changes in rates of pay, rules or working conditions as follows:

> "Seventh. No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreement or in section 156 of this title."

Another provision of the Act (45 USCA 156 provides:

> "Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board."

When changes in the labor agreement are made in accordance with these provisions, personal rights of members of the union may be "alienated" or destroyed without their "consent". As stated in *System Federation* v. *Louisiana and A. Railway Co.*, 32 F. Supp. 89, 90 (affirmed 119 F. 2d 509):

> "This was collective bargaining and the various plaintiffs herein were bound. It follows from the plain reading that any and all claims for *damages* for a violation of seniority rights are foregone and cancelled, certainly as far back as February 9, 1931." (Italics ours.)

Designated representatives of the employees have power to change the labor agreement. The Act so provides. Designated representatives also have power to compromise grievances. That power to make the compromise agreement of October 31, 1938, effective is derived from the provisions of the Act authorizing representatives "to settle all disputes" and "with all expedition."

Collective bargaining compromise agreements do not need to meet the technical requirements of consideration required by contracts of common law, as respondents argue (brief, p. 17-19). The only requisite is that the agreements express the intention of the parties to settle grievances. That was done in the compromise agreement of October 31, 1938. The Adjustment Board so found in its award:

Respondents argue (brief, p. 23) that the Board has no jurisdiction of their "individual" claims because there was no "authority" in C. H. Williams, Chairman of the Grievance Committee, to present the same to the Board. There is no dispute that C. H. Williams, as Chairman of the General Grievance Committee, was the designated representative of the respondents. He alone is the official of the Brotherhood authorized to file claims before the Adjustment Board. The first claim filed before the Board

relating to the alleged violation of Article 6 was filed by C. H. Williams as "General Chairman—BRT—EJ&E System" (R. 14). It is admitted by all respondents (brief, p. 25) that this claim was properly filed. The second claim for the alleged violation of Article 6 was filed by C. H. Williams as the designated representative of the respondents and as "General Chairman, B. of R. T., E.J.&E. System" (R. 72). This claim was filed in accordance with the provisions of Section 153 (i) of the Act (45 USCA) which in part provides that ". . . failing to reach adjustment . . ., the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with the full statement of the facts and all supporting data bearing upon the disputes."

Respondents argue (brief, p. 25) that designated representatives do not have authority under the Act or under the constitution and by-laws of the Brotherhood to file before the Board "claims for pay or claims for breach of contract." Respondents admit, however, (brief, p. 24) that the designated representatives do have authority to file before the Board claims relating to "rates of pay, rules or working conditions."

The claim filed before the Board by the designated representative in the case at bar related to rates of pay, rules and working condtions. The labor agreement or "schedule" signed by the Brotherhood and the petitioner in this case (Exhibit "H") is entitled "Rules and Rates of Pay for Yardmen." Respondents in their complaint predicated liability of the petitioner in accordance with Article 6 of that agreement.

The dispute "referred" to the Board in the case at bar was a dispute concerning "rates of pay, rules, and working conditions." The Act gave the designated representative the power to "refer" this claim before the Board, if he so elected. The fact that such a claim may

affect the "personal" or "individual" rights of the respondents is immaterial. Congress intended that disputes concerning these rights may be referred by the designated representative to the Board for adjudication. If specific authority of the designated representative is necessary from each employee relating to matters affecting the "personal" or "individual" rights of each employee, designated representatives will be stymied in carrying out their statutory duties. Furthermore, if such specific authority is necessary, one of the main objects of the Act "to settle all disputes" and "with all expedition" will be frustrated, contrary to the policy of Congress.

Respondents in their brief (pp. 24, 26) refer to *Griffin* v. *Chicago Union Station*, 13 F. Supp. 722, and *Nord* v. *Griffin*, 86 F. 2d 481, certiorari denied, 300 U. S. 673, for the purpose of showing that if the designated representatives do not have specific authority from the particular employee, the award of the Board is void and, also, that if the particular employee affected does not have actual notice of the hearing before the Board, that employee is denied due process of law guaranteed by the Fifth Amendment.

It is admitted that cases similar to *Griffin* v. *Chicago Union Station* and *Nord* v. *Griffin* are exceptions to paragraph (m) that non-money awards of the Board shall be final and binding. In other words, paragraph (m) should be construed to read that non-money awards of the Board shall be final and binding on both parties to the dispute, except insofar as the Act otherwise provides and except insofar as the constitution prohibits.

It is important to note also that in these cases (*Griffin* v. *Chicago Union Station and Nord* v. *Griffin*) the designated representatives before the Board took a position which was *adverse* to some employees. That relation does not apply to the facts in the case at bar. The designated

representative before the Board was a *proponent* of the claims for the respondents, the same which are asserted in the complaint now before this Court.

There is no requirement in the Act that notice shall be given to each particular employee who may be affected by the award when a claim is filed in his behalf by the designated representative. The designated representative had power by the Act itself to "refer" the claims of the respondents to the Adjustment Board for adjudication. The designated representatives of the respondents also had the right before their claims were referred to the Board for adjudication to file suit at law for damages. *Moore* v. *Illinois Central Railroad Co.*, 312 U. S. 630.

Nevertheless, once the case is referred to the Board by the designated representative and the Board has decided it and denied the claim of respondents, respondents later cannot assert the same claim in court. The policy of the Act that non-money awards of the Board are final and binding deprives courts of power, directly or indirectly, to pass upon the same claims adjudicated by the Board, except in the special cases for which provision is made in paragraph (p) of the Act, which provides the exclusive remedy for court review. *Cf. Baltimore and Ohio R. Co., et al.* v. *Brady*, 288 U. S. 448, 457; *I. C. C.* v. *United States*, 289 U. S. 385, 394.

When the designated representative files a claim before the Board, the action on the labor agreement at law which therefore existed is merged in the award. If this result does not follow, every time the claim filed before the Board by the designated representative is denied, the temptation will be great for each employee involved to assert that the designated representative did not have specific authority to file the claim and that, therefore, the employee should have another day in court by filing a suit at law for damages. This reasoning would destroy the policy of Congress to make non-money awards final and binding, ex-

cept as provided in paragraph (p), and would result in the intended adjudication of the Board being a mere ritual with no legal significance.

B.

No question is presented arising under the due process clause of the Fifth Amendment to the Federal Constitution.

On page 27 of the brief for the respondents there is presented the argument that

> "Certainly, the award asked for by Williams was a money award, and though it was not awarded, it 'contained' a money award."

This construction does violence to the language of paragraph (m). Paragraph (m) cannot reasonably be construed to mean that the awards of the Board shall be final and binding upon both parties to the dispute except insofar as the claims filed by the designated representative sought to obtain a money award.

Apparently, counsel for the respondents themselves are not impressed with the argument because on page 31 they argue

> "If there is an award against the employee by the Adjustment Board, he can, for all practical purposes, disregard the same because it is of no effect whatsoever as far as he is concerned."

This conclusion is necessary for the respondents to maintain this suit. It disregards the provisions of the Act clearly expressed by Congress. There was no intention at the time of the passage of the 1934 amendments to the Railway Labor Act that awards by the Board denying claims of the employees might be "disregarded" and be considered of "no effect whatsoever." The policy declared by Congress was quite the contrary.

The Senate report on the 1934 amendments (Report No. 1065, 73rd Congress, 2nd Sess., Page 1 *et seq.*) in part stated:

> "Congress passed the Railway Labor Act with the joint approval of both the representatives of the railroads and the railway labor organizations. They believed it would enable them to settle their differences without the element of compulsion. . . .
>
> "One of the principal weaknesses of the law in practice has been that regional boards have not been set up in some sections of the country for settlement of the disputes in some of the crafts. Both representatives of the carriers and of the employees agree that the setting up of boards for the settlement of disputes should be made compulsory, when necessary. Representatives of the carriers proposed that the setting up of regional boards be made compulsory; representatives of most of the employees insisted that the setting up of the National Board of Adjustment with four divisions be made compulsory. . . .
>
> "The ideal situation would be to have disputes and grievances settled by the men and management on the several properties without any recourse to adjudication by an outside tribunal. Some of those advocating this legislation believe the fact that there is a compulsory board to which grievances may be taken will greatly increase the settlement of disputes by voluntary adjustment boards between the employees and the railroads."

Furtherfore, the report on the 1934 amendments by the House of Representatives (Report No. 1944, 73rd Congress, 2nd Sess.) in part stated:

> "This bill, therefore, provides for the establishment of a National Board of Adjustment to which these disputes may be submitted if they shall not have been adjusted in conference between the parties. . . .
>
> "Division 1 is given authority to hear and decide the disputes involving train, engine, and yard service employees, such as engineers, firemen, conductors, trainmen and switchmen. . . .

> "The committee is confident that this bill strengthens the Railway Labor Act where it is necessary to do so, and feels sure that if the Act is amended as proposed in this bill it will provide effective and adequate machinery to adjust controversies between the carrier, managements and employees. It will assure employees the right to bargain collectively and will contribute immeasurably to the establishment and maintenance of industrial peace."

The respondents argue (brief, p. 29) that paragraph (m) violates the due process clause of the Fifth Amendment because

> "when an award is entered against the employer and he refuses to comply therewith, it is necessary for the employee to file a suit at law, which is a trial *de novo.*"

The respondents concluded (p. 29) that

> "This situation affords the employer a right of review of the decision of the 'Board,' and refuses the same right of review to the employee."

This argument ignores the well settled policies of Brotherhoods not to seek court review when the award of the Board is in favor of the employee. In practice, the Brotherhoods rely upon their economic force. The argument that such an award is "absolutely meaningless" (respondents' brief, p. 32) is unrealistic. Generally, Brotherhoods do not find it "necessary" to file a suit at law to enforce awards of the Board in favor of employees. Consequently, carriers seldom are given a "right of review".

Furthermore, "a right of review" is not granted to the carrier by paragraph (p) of the Act when the award is in favor of the employee. Paragraph (p) is permissive only. It provides that if the carrier does not comply with the order of the Board, the petitioner or any person for

whose benefit such order was made *may* file in the District Court a petition setting forth the causes for which he claims relief.

Finally, if the designated representative elects to file a claim before the Board rather than before a court (*Moore* v. *Illinois Central Railroad Co.*, 312 U. S. 630), neither the designated representative nor the employees may complain about the want of due process if the award of the Board is adverse. Due process of law by court adjudication is always available to designated representatives or employees before they elect to file a claim before the Adjustment Board. The same considerations apply to a carrier before any claim is filed before the Board by designated representatives or by the employees. In these circumstances, the lack of due process argument does not apply.

The Fifth Amendment is a limitation upon the powers of the Federal Government. It is not directed against an election by designated representatives to avoid court adjudication. (*Corrigan, et al.* v. *Buckley*, 271 U. S. 223; *Teague* v. *Brotherhood of Locomotive Firemen*, 127 F. 2d 53.)

Court review is not a necessary supplement to due process of law in the Fourteenth Amendment. (*Reetz* v. *Michigan*, 188 U. S. 505; *Plymouth Coal Company* v. *Pennsylvania*, 232 U. S. 531, 547; *L. & N. R. Co.* v. *Greene*, 224 U. S. 522; *Hardware Dealers Mutual Fire Insurance Company* v. *Glidden Co.*, 284 U. S. 151.) Neither is court review necessary to due process of law in the Fifth Amendment. (*United States* v. *Heinze*, 218 U. S. 532; *Luckenbach S. S. Co.* v. *United States*, 272 U. S. 533; *National Labor Relations Board* v. *Jones and Laughlin Steel Corporation*, 301 U. S. 1, 46; *Virginian Railway Co.* v. *System Federation, No. 40*, 300 U. S. 515, 558.)

CONCLUSION.

When the petitioner made the compromise agreement of October 31, 1938, with the designated representatives of the respondents, the petitioner was not required to look behind the authority conferred by the Railway Labor Act upon the designated representatives to make the settlement. Specific authority of each respondent or of the local lodge to which the respondents may belong is not required by the Railway Labor Act. The respondents are bound by the collective bargaining compromise agreement of October 31, 1938. This Court should so decide and reverse the judgment of the Circuit Court of Appeals.

The award of the Adjustment Board finding that the compromise agreement disposed of all claims of the respondents against the petitioner should be held final and binding upon the respondents and a bar to this proceeding.

It "seems plain that the command of the statute to negotiate for the settlement of labor disputes, given in the appropriate exercise of the commerce power, cannot be said to be so arbitrary or unreasonable as to infringe due process." (*Virginian Railway Co.* v. *System Federation, No. 40*, 300 U. S. 515, 559.)

If the award against the employee may be "disregarded" and considered "of no effect whatsoever," as respondents contend in their brief (p. 31), the statutory scheme of settlement of railroad disputes devised by Congress will have no legal consequences. The result intended by Congress should be effectuated by this Court. That result can be obtained only by reversing the judgment of the Circuit Court of Appeals and affirming judgment for your petitioner entered by the District Court.

Respectfully submitted,

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CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 160

ELGIN, JOLIET AND EASTERN RAILWAY COMPANY, A CORPORATION,

Petitioner,

vs.

G. W. BURLEY, ET AL.,

Respondents.

REPLY TO THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, AND SUPPORTING BRIEF.

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THE DUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

SUBJECT INDEX.

	PAGE
Respondents' Statement Making Against the Jurisdiction	1
Brief in Support of Reply	3
A. Summary and Short Statement of the Matter Involved	3
B. Statement of Grounds on Which It Is Contended Court Does Not Have Jurisdiction	4
C. The Questions Presented	10
D. Reasons Relied Upon for Not Allowing Writ	10
Conclusion	11

Table of Cases Cited.

Adams, et al. v. N. Y. Central & St. Louis Ry. Co., 121 Fed. (2nd) 808 5

Ahlquist v. Alaska, etc., 39 Fed. (2nd) 348 5

Campana Corp. v. Harrison, 135 Fed. (2nd) 334, 336 ..... 3, 10

Division 525, Order of Railway Conductors v. Gorman, et al., 133 Fed. (2nd) 272 (C. C. A. 8th, 1943) 7

Fields v. U. S., 205 U. S. 292, 296 4

Hamilton-Brown Shoe Co. v. Wolf, 240 U. S. 251 4

Houston Oil Co. v. Goodrich, 245 U. S. 440 4

Illinois Central v. Moore, 112 Fed. (2nd) 959 (Reversed by this court on other grounds) 61 S. Ct. 754 5

J. I. Case v. National Labor Relations Board, 64 Supreme Court 576 6

Lau Ow Bew., Petitioner, 141 U. S. 583, 587 4

McCoy v. St. Joseph Belt Ry., 77 S. W. (2nd) 175, 178 5

Merchants Indemnity Corp. of N. Y. v. Peterson, 113 Fed. (2nd) 4, 6 ..... 3, 10

Order of Railroad Telegraphers v. Railway Express Agency, 64 Supreme Court 582 7

Panhandle Ry. v. Wilson, 55 S. W. (2nd) 216, 219 5

Pearcy v. Louisville N. Y. Ry. Co., 248 S. W. 1042, 1045 5

U. S. v. Rimer, 220 U. S. 547 2

Virginia Railway Company v. System Federation, No. 140, 300 U. S. 515 8

IN THE

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OCTOBER TERM, 1944.

No. 160

ELGIN, JOLIET AND EASTERN RAILWAY COMPANY, A CORPORATION,

Petitioner,

vs.

G. W. BURLEY, ET AL.,

Respondents.

RESPONDENTS' STATEMENT MAKING AGAINST THE JURISDICTION.

Respondents respectfully call the court's attention to the following grounds making against the jurisdiction of the court in this matter:

First, it is manifest that the petitioner has filed the petition only for purposes of delay.

The questions upon which it is claimed that the jurisdiction of this court depends are so unsubstantial and unrelated with the issues decided by the United States Circuit Court of Appeals as to need no further arguments.

Secondly, petitioner's assignment of errors fails to set out and show a compliance with Rule 38 Paragraph 2 of

the Rules of the Supreme Court. The petitioner fails to particularly disclose the basis upon which it contends that this court has jurisdiction. It cites no cases sustaining jurisdiction on the point involved. The petitioner fails to cite any cases decided by any other United States Circuit Court of Appeals or any other Circuit in conflict with the decision herein sought to be reviewed. *U. S.* v. *Rimer*, 220 U. S. 547.

All of the cases involving the question of procedure before the United States Supreme Court hold that petitioners for certiorari must with particularity show a compliance with the rules of the court in setting forth the grounds on which they claim the court has jurisdiction.

We respectfully suggest that the decision of the United States Circuit Court of Appeals of the Seventh Circuit was founded on a matter of judicial procedure. (R. 112.)

> "This case presents a question of fact as to whether a compromise of the claims relied upon in the plaintiff's complaint had been compromised by the plaintiff's agents. The procedure for summary judgment was intended to expedite the settlement of litigation where it affirmatively appears upon the record that in the last analysis there is only a question of law as to whether the party should have judgment in accordance with the motion for summary judgment. If there was any question of fact presented on the record in the proceedings for summary judgment, the motion could not be sustained. Because we think this record affirmatively shows there was an issue of fact, the motion for summary judgment should not have been granted."
>
> — Rule 56 of the Rules of Civil Procedure, 28 U. S. C. A.

We respectfully submit that Rule 56 should dispose of the present petition.

The record in the instant case clearly shows several issues of fact material to the controversy (R. 42) and in the

case of *Merchants Indemnity Corp. of N. Y.* v. *Peterson*, 113 Fed. (2nd) 4, 6, the record there stated that under Rule 56 a summary judgment may not be entered if there be an issue presented as to the existence of any material fact.

We submit that under Rule 56 and the decided cases, it is not contemplated that a trial should be had by affidavit when there are undecided issues of fact, without a right of cross-examination in open court.

Campana Corp. v. *Harrison*, 135 Fed. (2nd) 334, 336.

Merchants Indemnity Corp. of N. Y. v. *Peterson*, 113 Fed. (2nd) 4, 6.

BRIEF IN SUPPORT OF REPLY.

A.

Summary and Short Statement of the Matter Involved.

Respondents respectfully call this court's attention to the fact that at the top of page two of the petitioner's brief, it alleges that it is aggrieved by the decision of the United States ~~Circuit~~ Court of Appeals in denying a petition for rehearing, and that Judge Kerner dissented from this ruling. The truth of the matter is that Judge Kerner did not dissent. Judge Kerner did not concur. (R. 129.)

Petitioner fails in its summary to set forth all of the case upon which the opinion was rendered; namely; that a motion to strike the motion to dismiss and for summary judgment; was filed by the respondents (R. 41), and that a reply and counter-affidavit (R. 43-61) were filed by the respondents controverting the facts alleged in petitioner's affidavit in support of its motion.

B.

Statement of the Basis Upon Which It Is Contended That This Court Does Not Have Jurisdiction to Review the Judgment of the United States Circuit Court of Appeals for the Seventh Circuit.

The petitioner herein states that the jurisdiction of this court to grant the Writ of Certiorari is invoked under Section 240 (a) of Judicial Code (28 U. S. C. A. 347). The petitioner, however, fails to show specifically where, and under what part, of the aforesaid Section it seeks to invoke this Court's jurisdiction.

It is a well established principle of law that the jurisdiction of this tribunal to review decisions of the various Circuit Courts of Appeal should be sparingly exercised, and then only in cases of peculiar gravity and general importance; in cases affecting relations with foreign governments; or to secure uniformity of decisions among the various Circuit Courts of Appeal.

Lau Ow Bew, Petitioner, 141 U. S. 583, 587.
Fields v. *U. S.*, 205 U. S. 292, 296.
Hamilton-Brown Shoe Co. v. *Wolf*, 240 U. S. 251.
Houston Oil Co. v. *Goodrich*, 245 U. S. 440.

The petitioner herein fails with any particularity to show that the decision herein sought to be certified comes under any of the aforesaid reasons. It alleges that the decision is in conflict with the decisions of this Court and other Circuit Courts of Appeal, but fails to point out wherein it does so. We shall point out in later phases of our brief that the cases cited by the petitioner, supposedly in conflict with the decision rendered by the Circuit Court of Appeals in the instant case, are not even remotely similar.

On page five of its brief, the petitioner states:

> "If the decision of the Circuit Court of Appeals in this case is not reversed, collective bargaining will be destroyed."

The decision sought to be reviewed herein does not involve the issue of collective bargaining. It does not involve disputes concerning rates of pay, rules or working conditions, but does involve a question of Federal Court procedure wherein the authority of an agent to represent principals concerning their personal rights is challenged, and we maintain that officials of a trade union are not the agents of members for the purpose of waiving any personal rights they may have, unless they have specific authority so to do.

Illinois Central v. *Moore*, 112 Fed. (2nd) 959 (Reversed by this court on other grounds) 61 S. Ct. 754.

Pearcy v. *Louisville N. Y. Ry. Co.*, 248 S. W. 1042, 1045.

Panhandle Ry. v. *Wilson*, 55 S. W. (2nd) 216, 219.

McCoy v. *St. Joseph Belt Ry.*, 77 S. W. (2nd) 175, 178.

Ahlquist v. *Alaska etc.*, 39 Fed. (2nd) 348.

Under the Railway Labor Act, 45 U. S. C. A. Paragraph 153, the employee has the right to bring his action in court, or he may utilize the administrative remedies therein set forth. In *Adams et al.*, v. *N. Y. Central & St. Louis Ry. Co.*, 121 Fed. (2nd) 808. On page 810, the court said:

> "In view of the Supreme Court's clarifying language as to the intended scope of the Railway Labor Act, * * * we can definitely state that the employees' action may be brought at their election, either in a court or settled by the administrative remedies prescribed by said Act."

Petitioner throughout its petition and all of the authorities that it has cited in support of its contention that collective bargaining is the gist of the action here involved, has cited cases on an entirely different and distinct section of the Railway Labor Act, being Section 155 thereof, dealing with the Mediation Board, set up under the Railway Labor Act, which was designed by Congress to mediate controversies arising between unions and between unions and the employer carrier, which provides for no interference nor interpretation by the courts. It is merely set up for the purpose of acting in a referee capacity.

The decision herein sought to be reviewed deals solely with a question of procedure for summary judgment, as issues of fact had been presented by the affidavits in support of defendant's motion, and controverted by plaintiff's reply and counter-affidavit wherein they denied the authority of the agent to handle their individual and personal claims before the Railway Adjustment Board.

On page four, petitioner states that the Railway Labor Act and the decisions of this court prohibit individual dealings with employees. This assertion does not correctly represent the law and is contradicted by the statute and the very cases cited by counsel; which he still insists upon alleging, although corrected in the Circuit Court of Appeals. Section 152 of the Railway Labor Act, the fourth paragraph, *inter alia*, reads as follows:

> "That nothing in this chapter shall be construed to prohibit a carrier from permitting an employee, individually, or local representatives of employees, from conferring with management during working hours without loss of time * * *"

On page five, petitioner cites the case of *J. I. Case v. National Labor Relations Board*, 64 Sup. Ct. 576, in support of its contention that the Railway Labor Act prohibits individual dealings between employees and employer. We

could dismiss the case by remarking that it involves the National Labor Relations Act and not the Railway Labor Act, but we call the court's attention to a statement found in the case in order to point out the attempt by petitioner to mislead the court. On page 581 this court therein stated:

> "We know of nothing to prevent the employee's, because he is an employee, making any contract provided it is not inconsistent with a collective agreement or is not part of an unfair labor practice."

which we submit is diametrically opposed to petitioner's contention.

Petitioner also cites, *Order of Railroad Telegraphers* v. *Railway Express Agency*, 64 Sup. Ct. 582, supposedly supporting the same contention. In this case the Express Company attempted to vary the terms of an agreement negotiated through collective bargaining, by entering into individual contracts with its employees. The Court ruled that the agreement negotiated through collective bargaining was not superseded by individual contracts and that the latter were ineffective. The facts in the case are not even remotely analogous to the instant case.

On page six of its brief, the petitioner cites five cases as supposedly being in conflict with the decision rendered by the Circuit Court of Appeals in the instant cause. We shall not burden this Court by reviewing and analyzing all of the five cases, but in order to show petitioner's misconception and misconstruction of the law applicable to the instant cause, we shall briefly analyze two of the five cases cited by petitioner.

In *Division 523, Order of Railway Conductors* v. *Gorman, et al.*, 133 Fed. (2nd) 272 (C. C. A. 8th, 1943), the president of the Order had the power to "confirm, reverse or annul, and remand for reconsideration" any contract entered into by the union on behalf of the employees. The president of the Order cancelled a contract and the employees ques-

tioned the validity of the cancellation of the first contract. The Court in sustaining the cancellation of the contract emphasized the fact that the decision of the president of the Order was final. On page 278 the Court said:

> "While we think it is not within the province of the court to determine the regularity of the procedure to enter into the agreements involved, yet a study of the record convinces that the procedure was that prescribed by the rules of the Order and, hence, the decision of the president was valid and binding on the plaintiffs."

In *Virginian Railway Company* v. *System Federation, No. 140*, 300 U. S. 515. On pages 548-549, the court made the following statement:

> "We think, as the government concedes in its brief, that the injunction against petitioners entering into contract concerning rules, rates of pay and working conditions, except with respondents, is designed only to prevent collective bargaining with anyone purporting to represent employees other than respondent, who has been ascertained to be their true representative. When read in its context, it must be taken to prohibit the negotiation of labor contracts, generally applicable to employees in the mechanical department, with any representative other than respondent, *but not as precluding such individual contracts as petitioner may elect to make directly with individual employees.*" (Italics ours.)

In the second paragraph on page six of its brief, petitioner makes the allegation that the present case is not unlike a jurisdictional controversy between unions. It cites three cases to the effect that jurisdictional controversies between unions are not justiciable controversies within the meaning of the Railway Labor Act. All of the cases cited by the petitioner to support this point involved hearings before the National Mediation Board and are not in point.

On page four petitioner makes the allegation that this

case necessarily involves a construction of the Railway Labor Act. We have heretofore attempted to point out to this court what the case involves and respectfully suggest that by this statement petitioner is "Putting the cart before the horse." If it should be found that the purported agent of the plaintiff respondents herein, did not have authority to submit the individual and personal claims of the employees to the Adjustment Board, then any questions concerning the Railway Labor Act, or a decision of the Adjustment Board could not arise, because the proceeding before the Adjustment Board would be void, because the Board lacked jurisdiction. If under the controverted question of authority of the agent, it is decided, after a due and proper trial in court, that the agent did represent these respondents, then the question of the finality of the decision of the Adjustment Board could be raised, as also the question of the constitutionality of the Railway Labor Act, the Act failing to give the employee a right of review of the Board's decision when the Act in effect gives a right of review to the employer, thereby violating the due process provision of the United States Constitution.

But, we respectfully submit, those questions are not, and cannot be before this Court, until the question of agency is determined; and that, by a properly constituted and impaneled jury.

In summarizing, we respectfully reiterate that the only principle of law decided by the United States Circuit Court of Appeals in the instant case, is a matter of procedure, as to whether or not a District Court should properly, upon a hearing by affidavits, enter an order on a motion for summary judgment; when there is a dispute as to a material fact.

There is no disagreement with this decision and any

other decision of the various circuits of the Circuit Courts of Appeal. Petitioner has cited none in point.

C.

The Questions Presented.

The questions that petitioner set forth in paragraph C of its petition entirely ignore the actual issue presented by the decision of the United States Circuit Court of Appeals in the instant case, for none of them was passed upon, nor decided by, the court in its decision herein sought to be reviewed. Petitioner has avoided the real issue in controversy.

D.

Reasons Relied Upon for Not Allowing the Writ.

As heretofore shown, the decision of the Circuit Court of Appeals does not conflict with any decisions of this court nor with decisions of other Circuit Courts of Appeal.

We feel certain that this court will not wish to be burdened with a question of procedure that has been stated by rules and followed uniformly by the different Circuit Courts of Appeal.

Rule 56 of the Rules of Civil Procedure, 28 U. S. C. A.

Campana Corp. v. *Harrison*, 135 Fed. (2nd) 334, 336.

Merchants Indemnity Corp. of N. Y. v. *Peterson*, 113 Fed. (2nd) 4, 6.

This court is too familiar with the long established doctrine that where a court or administrative tribunal does not have jurisdiction over the parties any order entered by it is void. We will, therefore, not burden the Court with

any further discussion or citation on the matter, but wish to assert the same in answer to petitioner's statement contained under Heading "D".

Conclusion.

In our brief, we have pointed out that the only question involved in the instant cause is one of procedure; namely, whether or not the district court was in error in entering a summary judgment.

We have shown that the instant cause does not involve the question of collective bargaining, nor the construction of the Railway Labor Act. The cases cited by petitioner in its brief involve controversies before the National Mediation Board and, consequently, are not in point.

The petitioner has failed to show that the case is one of peculiar gravity or that there is any conflict between the decision in the instant case and the decisions of the other Circuit Courts of Appeal. The foregoing reasons impel the conclusion that in this case, certiorari should be denied.

Respectfully submitted,

JOHN H. GATELY,
Counsel for Respondents.

GERALD J. KOPTIK,
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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1944.

No. 160

ELGIN, JOLIET AND EASTERN RAILWAY COMPANY, A CORPORATION,

Petitioner,

vs.

G. W. BURLEY, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENTS.

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SUBJECT INDEX.

	PAGE
Report of Opinion	1
Statement making against the Jurisdiction of this Court	1
Statement of the Case	1
Summary of Argument	7
Argument	10
I. Petitioner's Motion to Dismiss the Complaint and for Summary Judgment was allowed in the Lower Court contrary to law	10
II. The letter of October 28, 1938, could not be considered as a valid release of the individual claims of Respondents	12
a. There was no authority for the execution of any release by the General Chairman	12
b. There was no consideration received by Respondents	17
c. It is self-evident from the contents of the letter that it is not a release of the individual claims of Respondents	19
III. The award of the National Railroad Adjustment Board refusing to give effect to the individual claims of the Respondents herein is not *res judicata* of said individual claims	23
a. The Board had no jurisdiction of the individual Respondent's claims herein because there was no authority vested in C. H. Williams to present the same	23

b. Respondents had no notice of any hearing or of the pendency of any hearing 25

c. The award of the National Railroad Adjustment Board is not final because the statute under which said Board operates specifically excepts money awards from being final 26

IV. The Section of the Railway Labor Act which provides that the award of the Adjustment Board is final and binding, except when the same contains a money award, violates the due process clause of the Fifth Amendment to the Federal Constitution 29

Reply and Conclusion 35-38

TABLE OF CASES CITED.

Ahlquist v. Alaska, etc., 39 Fed. (2d) 348 15

Berryman v. Pullman Co., 48 F. S. 542 36

Burba v. Baltic American Line, 233 Ill. App. 132 25

Burke v. Monumental Div., 273 Fed. 707 16

Burley, et al. v. E. J. & E. Ry. Co., 140 Fed. (2d) 488 11

Campana Corp. v. Harrison, 135 Fed. (2d) 334, 336 11

Consolidated Indemnity Company v. Alliance Company, 68 Fed. (2d) 21 11

Cook v. Des Moines Union Ry. Co., 16 Fed. Supp. 810 34

Donovan v. Travers, 285 Mass. 167, 188 N. E. 705 16

Estes v. Union Terminal Co., 189 Fed. (2d) 768 35-36

Ferryboatmen's Union v. N. W. P. Ry. Co., 84 Fed. (2d) 773 ..... 18, 22

1st Nat'l Bank v. Conway, 94 Fed. (2d) 736, certiorari denied by this court in 58 S. Ct. 1047 11

Griffin v. Chicago Union Station, 13 Fed. Suppl. 722 ... 24
Griffith v. Mass. Mutual Life, 96 Fed. (2d) 57 11
Illinois Central v. Moore, 112 Fed. (2d) 959, 965 ..... 13, 27
In re Henry S. Grove, 22 Fed. (2d) 444 16
Klink v. Chicago R. I. and P. Ry. Company, 219 Fed. 457 11
Lane v. Union Terminal, 12 Fed. Supp. 204 34
Litwin v. Litwin, 30 N. E. (2d) 619, 622 18
McCoy v. St. Joseph Belt Ry. Co., 77 S. W. (2d) 175 ... 14
Monson v. Kill, 144 Ill. 248 25
Moore v. Illinois Central Railroad Co., 312 U. S. 360 ... 37
National Surety v. Ellison, 88 Fed. (2d) 399 11
N. Y. Life Ins. Co. v. Horton, 9 Fed. (2d) 320 25
Nord v. Griffin, 86 Fed. (2d) 481 26
Panhandle Ry. v. Wilson, 55 S. W. (2d) 216 14
Piercy v. Louisville & N. Ry. Co., 248 S. W. 1042 ..... 13, 24
Rentschler v. Missouri Pacific Ry., 253 N. W. 694 29
Smith, et al. v. Texas N. O. R. Co., 118 Fed. (2d) 75 ... 37
Stephenson, et al. v. New Orleans & N. E. Ry. Co., 177 So. 509 ..... 28, 34
System Federation v. Louisiana Ry., 30 Fed. Supp. 909 29
Washington Terminal Co. v. Boswell, 124 F. (2d) 235 .27, 29
Wisconsin and Arkansas Lumber Co. v. Day, 35 Fed. 563 11

STATUTES CITED.

Railway Labor Act, U. S. C. A., Title 45, Section 151 ... 37
Railway Labor Act, U. S. C. A., Title 45, Section 153 ... 25, 27, 29, 35, 37

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1944.

No. 160

ELGIN, JOLIET AND EASTERN RAILWAY COMPANY, A CORPORATION,

Petitioner.

vs.

G. W. BURLEY, ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR RESPONDENT.

I.

Report of Opinion.

The opinion of the Circuit Court of Appeals (R. 110-113) is reported in 140 F. 2d 488.

STATEMENT OF THE CASE.

Petitioner, in its Statement of the Case, correctly sets forth the pleadings but fails to accurately inform the Court of the facts of the case. We, therefore, submit the following summary as our Statement of the Case.

This is an action brought by the Respondents to recover damages for a breach of contract by the Petitioner in refusing to permit the Respondents to start work at the designated starting times set out in the "schedule", or agreement, entered into with the Respondents by the Petitioner. The Petitioner filed a motion to dismiss and for summary judgment supported by affidavits. Respondents filed counter-affidavits which controverted several of the pertinent facts set out in the Petitioner's affidavit. Petitioner herein, in its motion to dismiss, set up a plea of release and a plea of *res judicata*. The plea of release was predicated upon a letter signed by the General Chairman and General Secretary of the Brotherhood of Railroad Trainmen, of which the Respondents were members. Respondents contend that the letter was not a release of the personal claims they had against the Petitioner, because the letter was not signed by all of the necessary officials of the Brotherhood of Railroad Trainmen, contrary to the By-laws thereof, of which the Petitioner had knowledge. The further objection to giving effect to the letter was that it was signed without the authority or knowledge of the Respondents. Further, that it could not act as a valid release because there was no consideration therefor, and there was no meeting of the minds of the contracting parties.

The alleged plea of *res judicata* set up a decision of the National Railroad Adjustment Board, which decision was predicated upon claims that had been filed by one of the officials of the Brotherhood, without the authority or knowledge of the Respondents, for the individual claims the Respondents had by reason of the breach of their contract with the Petitioner. This decision was adverse to the Respondents. The "*Board*" found that the letter, aforesaid, which had been pleaded by the Petitioner before the "*Board*", was a release of liability.

Respondents filed a motion to strike the motion of the Petitioner and set out, therein, that there were may issues of fact only triable by a jury.

Respondents contend that the affidavits filed raised opposing questions of fact pertaining to the case and that, therefore, the case should have been tried by a jury rather than determined on a motion for summary judgment.

The Lower Court sustained the motion and entered an order dismissing the complaint.

An appeal was taken to the U. S. Circuit Court of Appeals, Seventh District, and therein certain errors were set forth; being the Court's considering the letter to be a release; that the decision of the "Board" was final; in failing to hold that Section 153-(m) and (p) of the Railway Labor Act was unconstitutional, and in granting the motion for summary judgment.

Prior to July 24, 1934, the Respondents herein had been employed by the Standard Oil Company, Whiting, Indiana, to perform private switching in their yard at Whiting. On July 24, 1934, they entered into an agreement with the Petitioner, through the officials of the Brotherhood of Railroad Trainmen, (which we will subsequently refer to as the B. of R. T.) which agreement or "schedule", as it is called, had been received as Ex. H, of the Petitioner in the United States Circuit Court of Appeals in accordance with its order of July 26, 1941. Article 6 of said "schedule" concerns the starting times when the Respondents herein were to begin work for the various yard crews, the Whiting yard included. Contrary to said agreement, despite the repeated protests of the Respondents, the Petitioner refused to make available switch engines for the Respondents at the times designated in Article 6 of the "schedule". (Ex. H aforesaid.)

Respondents filed many complaints objecting to the refusal to abide by Article 6, with the local officials of the Petitioner and through the local officials of the B. of R. T. with the Petitioner, and time slips were made out (R. 47, par. 10, p. 48, par 13). Subsequently, at a meeting of the B. of R. T., authority was given to the B. of R. T. officials by Respondents, and others working at the Whiting yard, to file a complaint with the National Railroad Adjustment Board to require the Petitioner to comply with Article 6. Thereafter, on November 23, 1936, the same was filed (Doc. 3537, R. p. 14, 15).

The complaint filed with the National Railroad Adjustment Board, hereinafter referred to as the "Board", as aforesaid, was in accordance with the Constitution and By-Laws of the B. of R. T. (Par. 5, 6, and 7, Ex. G, a copy of which had been filed with the United States Circuit Court of Appeals, in accordance with the order entered July 26, 1941), which Exhibit had been offered by the Petitioner herein.

Subsequently, on October 31, 1938, without any notice or authority, and without any consideration to the Respondents, the General Chairman and the Secretary of the B. of R. T. consented, in writing, on a letter executed by the Petitioner, (R. 16-23) to the compromising of 61 separate cases then pending before the National Railroad Adjustment Board. Eleven of these cases involved grievances against the Petitioner herein, including the grievance, being case No. 5 (R. 17). Fifty of the matters contained in said letter involved specific claims for money for eighty five or more individuals, four of which involved personal injury claims (cases nos. 46, 47, 48, 54, R. p. 22). In and by said letter the Petitioner herein agreed in the future to abide by Article 6.

That under rule No. 3 of the Constitution, and general rules of the B. of R. T. (Ex. A, R. 50), the whole general grievance committee could not revise or change a general wage "schedule" or agreement concerning rates of pay, nor working conditions, unless authorized to do so by a majority vote of the lodges, or by a majority vote of the membership in the system. The general grievance committee consists of the General Chairman, the General Secretary and the Local Chairman (Constitution and General Rules of the B. of R. T., Ex. G of the Petitioner heretofore filed, p. 166, par. 7 lines 10-23). These three men did not sign the letter (R. 23). It is signed by C. H. Williams, the General Chairman, and S. F. Johnson, the Secretary.

On May 18, 1939, without any authority or knowledge of the Respondents (R. 44, par. 3-A), General Chairman Williams filed claims for money for the Respondents herein before the "*Board*". Thereafter an award was made thereon denying the same (Ex. F, R. 26-39).

That while said alleged claims of Respondents herein were then pending, the Brotherhood of Firemen and Engineers filed a claim with said "*Board*", involving the identical subject matter of the Respondents herein, and an award was made in the employee's favor by said "*Board*". (R. 52, Ex. B).

Neither Chairman Williams nor Secretary Johnson had any authority from the Respondents herein to waive, or give any release for, any individual claims of the Respondents (R. 49, par. 19). They failed to notify the Respondents and other members of Lodge 281 of their "settlement of claims" (R. 49, par. 20), as required by the By-Laws of the B. of R. T. (R. page 51, rule 81). Respondents contend that Williams, as General Chairman, being one of the signers of the letter of October 28, 1938, aforesaid, did not consider said letter a waiver of the individual claims

of Respondents, for he did not notify Respondents of any settlement in accordance with the rule aforesaid, and a short time after the execution of said letter, without the knowledege of the Respondents, filed the individual claims before the "Board". (R. 26).

SUMMARY OF ARGUMENT.

A summary judgment cannot be rendered where there are contested issues of fact. Respondents maintain that the following were contested issues of fact in the instant cause:

1. Were the officials who executed the purported release, being the letter of October 28, 1938 (R. 16) authorized and empowered to issue any release of the individual claims of the respondents herein.

2. Did said officials of the B. of R. T. act as agents of the Respondents herein in filing any individual claims with the National Railroad Adjustment Board.

3. Was there a meeting of the minds of the respective parties who signed the letter, as required by law of contracts, so that the letter of October 28, 1938, could be considered a valid contract. The position of the Respondents being that there was no meeting of the minds on any release of individual claims of Respondents herein, because shortly thereafter, Williams, one of the signers, filed claims for time with the Railroad Adjustment Board.

These questions of fact were controverted, and under the law must necessarily be submitted to a jury for decision. Therefore, the allowance of the motion for summary judgment was in error.

If Williams and Johnson, the officials of the B. of R. T., were not authorized under the By-laws of the B. of R. T., nor specifically, by these Respondents, to sign a release for their individual claims, and there is no presumption in law that they could so act as their agents, then the letter of October 28, 1938, (R. 16) could not, and should

not, be considered as a valid release of the individual claims of the Respondents herein.

The officials of a union do not have authority *ipso facto* to waive, nor release, the individual rights of the members of the Union.

The so called release pleaded by the Petitioner herein, being the letter of October 28, 1938, (R. 16) could not be considered a valid release of itself because of lack of authority in the signers to represent the Respondents herein. There was no consideration received by the Respondents to support a release. The letter itself by its terms does not purport to be a release of the individual claims of the Respondents, but rather refers to the claims for money on other claims therein set forth.

The award, pleaded by the Petitioner herein, of the National Railroad Adjustment Board, denying the individual claims of the Respondents herein to damages, by reason of the Petitioner's breach of Article 6, cannot be considered as *res judicata* of the Respondents' claims.

The "Board" lacked jurisdiction over these Respondents in the case as pleaded by the Petitioner herein. First, because the claims were filed by Williams without authority or knowledge of the Respondents herein (R. 48, par. 14, 15, 16). Second, because there was no notice of any hearing or the pendency of the hearing given to the Respondents herein. (R. 48, par. 17).

Section 153 (M) and (P) of the National Railway Labor Act must be held unconstitutional as controvening the Fifth Amendment to the Federal Constitution as being a violation of due process of law. The employer or carrier under the Act is given a right of review in the event the decision of the "Board" is against it. After an order is entered by the "Board", requiring the carrier to perform

any act, it may refuse to do so, and the remedy of the employee is the filing of a suit in the District Court based upon the award. The ensuing trial is a trial *de novo*. Thereby the carrier obtains a review of the award.

If the employee is unsuccessful before the "Board", its decision is against him, he has no redress.

We submit that such a procedure is unconstitutional.

ARGUMENT.

I.

Petitioner's motion to dismiss the complaint and for summary judgment was allowed in the lower court contrary to law.

Petitioner herein has adroitly evaded, in its points, the compelling fact decided by the United States Circuit Court of Appeals herein, namely, that in order for any court, or board, to render any binding decision, it must have jurisdiction of the parties. We maintain, in the instant case, that the "award" of the National Railroad Adjustment Board, pleaded by Petitioner herein as *res judicata*, is void for want of jurisdiction of the parties.

The Affidavits and Counter Affidavits (R. 11, 46, 61) filed in this cause in connection with the Motion for Summary Judgment and the Motion to Dismiss, presented controverted issues of fact. A Jury Trial had been requested at the filing of the suit. Therefore, the court was not empowered, nor authorized, to pass upon these facts on the hearing of a Motion for Summary Judgment, as the United States Circuit Court of Appeals finds, in its decision (R. 112). The main controverted facts were:

1. The question of authority of Williams, as Chairman, and Johnson, as Secretary, of the B. of R. T., as set out in the Counter Affidavit on the Motion to Dismiss (R. 45, Par. 11, 14, 15, 16, 19), to compromise any claims with the Petitioner, when they were only empowered to file a grievance to compel the Petitioner herein to abide by the terms of Article 6;

2. Whether or not Williams had authority to file any personal claims of the Respondents with the National Railroad Adjustment Board.

3. Whether or not there was a "meeting of the minds" between Williams and Johnson and the Petitioner in the letter of October 28, 1938 (R. 16), pleaded by the Petitioner as a release.

4. Whether a contract is supported by sufficient consideration is a question of fact and should be submitted to the jury.

We submit that all of the decisive cases on the point concur, in the enunciation of the law, that where there are contested issues of material facts, the court should not dispose of a case on a Motion for Summary Judgment, and that the only time a Motion for a Summary Judgment may be allowed is when the same is sustained by undisputed facts.

Consolidated Indemnity Company v. *Alliance Company*, 68 Fed. (2d) 21.

Klink v. *Chicago R. I. and P. Ry. Company*, 219 Fed. 457.

National Surety v. *Ellison*, 88 Fed. (2d) 399.

1st Nat'l. Bank v. *Conway*, 94 Fed. (2d) 736, certiorari denied by this court in 58 S. Ct. 1047.

Griffith v. *Mass. Mutual Life*, 96 Fed. (2d) 57.

Campand Corp. v. *Harrison*, 135 Fed. (2d) 334, 336.

Burley, et al. v. *E. J. & E. Ry. Co.*, 140 Fed. (2d) 488.

It is a fundamental principle of law, that in nearly all instances, the question of an agent's authority is a question of fact and should be passed upon by a jury.

In *Wisconsin and Arkansas Lumber Co.* v. *Day*, 35 Fed. 563 at 566, the Court said:

"Ordinarily the question of whether an agent has apparent authority to act for his principal is a question for the jury, when the contract is not in writing.

This is but an application of the rule that even though the facts are undisputed, if different inferences may be reasonably drawn from these facts, the question is for the jury."

II.

The letter of October 28, 1938 could not be considered as a valid release of the individual claims of respondents.

(a) There was no authority for the execution of any release by the General Chairman.

General Chairman Williams, under the Constitution of the By-Laws of the B. of R. T., has limited power and authority, his duties and obligations are set out in the B. of R. T. Constitution (Exhibit "G" filed with the court under order of July 26, 1941, p. 166, par. 7). Among his duties is the filing of grievances or claims for, and on behalf of, members or groups or lodges or all of the lodges of the particular roads of the B. of R. T. In order for him to receive a grievance for handling it is necessary that the local lodge hear and determine the matter and after passing upon the same submit it to him for handling. The General Grievance Committee consisting of the General and Local Chairman of the Lodge, and the General Secretary consults with the General Superintendent of the System. After this Committee makes any settlement it is required that within 30 days they notify the Secretary of the Lodge where the Grievance originated, and the member or members affected thereby of such action in writing (B. of R. T. Constitution, p. 168, par. 8½). The Petitioner herein was well acquainted with this procedure and the rules and regulations of the Brotherhood, for it was the Petitioner herein who introduced the B. of R. T. Constitution as an Exhibit.

We respectfully submit that on the original grievance

filed with the Board (Case No. 3537, R. 13) the aforesaid procedure had purportedly been adhered to up to the point of the settlement claimed by the Petitioner. However, as will be noted by Petitioner's Ex. C (R. 16), the same was executed by C. H. Williams, as General Chairman, and S. F. Johnson, Secretary, but there is no signature of the Local Chairman as heretofore shown to be required.

As stated in the Affidavit of the Respondents, filed herein (R. 45, par. 14, 15 and 16), the only authority vested in Williams as General Chairman was to present a Complaint to the "Board" to comply with Article 6 by furnishing engines and work at the times therein specified.

The officers of the B. of R. T. have no authority to waive private rights. As this Court has confirmed in *Illinois Central* v. *Moore*, 112 Fed. (2d) 959 (reversed by the Supreme Court on other grounds, 61 S. Ct. 754 at page 965), the United States Circuit Court of Appeals stated:

> "The collective agreement as such is made, defended and changed by the union, but the rights of each employee under it *are his own* and he may waive or assert them himself as he sees fit." (Italics ours.)

And at page 966 held:

> "The seniority provision of a collective agreement is an important and valuable part of the individual contracts of employment made thereunder. It has been held the union cannot waive or destroy it."

In the case of *Pierce* v. *Louisville & N. Ry. Co.*, 248 S. W. 1042, the court stated, p. 1045:

> "The officers of such organizations (order of railroad conductors union) are, as to the individual rights of its members, not to be deemed as their agents—agreements between organizations between employees and their employer, and designated primarily for the individual benefit of the members of the organization, *and not to place it within the power of the organization to change or modify the contract at its pleasure, so as*

to affect the individual rights of its members theretofore secured by the agreement.

"If the right of seniority may be changed or waived or otherwise dispensed with by the act of a bare majority of an organization, to which the one entitled thereto is a member, it would be building upon a flimsy foundation of sand, which might slip from under him at any time by the arbitrary action of the members, possibly to serve their own selfish ends in displacing him.

"* * * his agreement did not contemplate the submission by him to that body of the determination of any question involving his personal rights. But here *we have a personal right acquired by him as against the railroad company under contract, and we have the Order of Railroad Conductors asserting the right to waive for him the benefits of that contract.* It could not have been in contemplation by a member of such organization that he agreed when he entered to submit to the order for decision a controversy involving his rights as against a third party." (Italics ours.)

In the case of *Panhandle Ry.* v. *Wilson*, 55 S. W. (2d) 216, p. 219, conversely to the instant case the court stated:

"The rule is that individual members of a labor union are not bound by the contract between the union and the employers unless such agreements are ratified by the members of the union as individuals, and that in the absence of evidence of such ratification by a member, no rights accrue to him which he can enforce against the employer."

We submit that no rights of the members can be alienated without the member's consent, as the "Board" and lower Court did in the instant case.

We believe the case of *McCoy* v. *St. Joseph Belt Ry. Co.*, 77 S. W. (2d) 175, to be impelling in the instant case where the court states at p. 178:

"The evidence in plaintiff's favor is further to the effect that without any authority from the men, he

sought to change the seniority rights and positions of the employees of defendant, over their objections, including plaintiff.

"The evidence, in plaintiff's favor is further to the effect that it was never agreed by the committee either to consolidate the lists or to change any working arrangements, nor was any vote taken on these matters, and the matters stated as agreed to in the letter above mentioned were not agreed to at all. In fact, no notice was given to the men's committee or to plaintiff of the change, other than the posting of the notice in the yards as aforesaid.

"Nor is there evidence that defendant's manager ever secured from the committee of defendant's employees, either orally or in writing, consent that the seniorities of defendant's employees might be changed to conform to the consolidated list, nor that such an agreement was made with defendant's employees either individually or as a group.

"There is nothing in the record from which it can be inferred that he individually participated in the making of the contract, or that he thereafter ratified it."

Page 182:

"The evidence in behalf of the latter sufficiently tends to show, and to authorize the jury to believe, if they did, that *what McQuaid did in composing the consolidated seniority list was merely his own unauthorized act without consulting those empowered to make such change, and defendant acted upon his said unauthorized act and made no investigation of his authority, nor made any effort to repair what was done when it learned the true fact about the matter.* But even if he did, *there is no evidence of any authority in the B. of R. T. to change or modify the contract so as to affect the individual rights of a member which rights were theretofore secured by the contract.*" (Our italics.)

See also the case of *Ahlquist* v. *Alaska, etc.*, 39 Fed. (2d) 348.

Certainly, a right to damages is as valuable a right as a seniority right, and we believe the court should not fail to follow these decisions in holding that a union, nor its officials, cannot waive or destroy it.

To hold otherwise would subject the millions of members of the various unions throughout the country to the whim or fancy and dishonesty of their officials and make uncontrollable dictators of them. We sincerely believe that such is not the intent nor the purpose of the union movement in this country, nor is it the intent or purpose of the courts of this country to so clothe them with such authority.

We also submit the case of the *Henry S. Grove*, 22 Fed. (2nd) 444, at page 446, paragraph 5 thereof, wherein the Court in passing upon an analogous situation to the instant case said:

> "Courts should frown upon any attempt made by employers of large numbers of laboring men to curtail their legal remedies and shut them off summarily from access to the courts, in the absence of a showing of complete mutuality. Large corporations, and especially insurance companies, are often too prone to take advantage of a situation, difficult even for the technician to understand."

We believe this last phrase is particularly pertinent to the facts in the instant case. See also *Burke* v. *Monumental Div.*, 273 Fed. 707.

If the so-called compromise agreement of the Petitioner—and we repeat, the Petitioner—which was drafted by them, was entered into without authority by the parties supposedly representing the Respondents herein, then it was invalid, and in that event the individual rights or claims of the Respondents cannot be lost thereby.

In Sub-Point E of Point II of Petitioner's brief they cite *Donovan* v. *Travers*, 285 Mass. 167, 188 N. E. 705, in which the Court states:

> "It is settled law that members of an unincorporated

> voluntary association, like the Brotherhood, are bound by the determination of the association's tribunal *if the decision is reached after observance of the formalities it prescribes*, after fair opportunity of presenting their case, *where there has been no excess of jurisdiction*, no bad faith or capricious, unreasonable or arbitrary action." (Italics ours.)

which we respectfully submit is the exact status of the instant case, and we wish to emphasize at this point that nowhere in counsel's brief has he answered our previous contention that the two officials of the Brotherhood did not act officially, for they failed to comply with the rules and constitution of the Brotherhood.

We believe the instant case is on all fours with the quoted opinions and that, in right and justice, they should be followed by this court in affirming the order of the United States Circuit Court of Appeals herein.

(b) There was no consideration received by respondents.

There was no consideration of any kind passed between the Petitioner and the Respondents for the execution of a release (as contended by Petitioner in the letter of October 28, 1938). We believe this is self-evident from an examination of Petitioner's Ex. "C" (R. 16) Case No. 5 thereof. The only thing that was presented by the Local Lodge to Williams, the General Chairman of the Grievance Committee, and to the "Board" was "starting time of switch engines of Whiting S. O. Yard" as set forth in the letter. (R. 17.)

This controversy was settled by the parties by the following (R. 17):

> "Settlement by agreement that the starting times for a 90 day trial period commencing November 15, 1938, shall be the times provided for in Article 6 of the Yardmen's Agreement instead of starting times heretofore agreed upon and now being followed. * * *"

There was no release of any individual claims of these Respondents and no consideration passed to these Respondents for any release, as no claims of these Respondents were presented, argued nor settled by the letter of October 28, 1938.

The "Board," in considering the unauthorized claims that Williams presented to them, considered this letter as a release of the individual claims of the Respondents herein, and we submit that the "Board" by so doing committed a grievous error and therein made the refusal of the award invalid.

Petitioner herein, has not, and we believe cannot ask this court to believe that the agreement to abide by the terms of Article 6, can be considered as a consideration in settlement of Respondent's individual claims, because the law is well settled that an agreement to do something, which a person is already legally bound to do, is not a sufficient consideration to support any agreement.

As was stated in an Illinois decision *Litwin* v. *Litwin*, 30 N. E. (2d) 619, at page 622:

> "* * * promising to do what she was already bound to do (referring to a consideration). A promise of that kind was not a sufficient consideration for the assignment."

In the case of *Ferryboatmen's Union of California* v. *N. W. P. Ry.*, 84 Fed. (2d) 773, the court there held that something a party is required to do is not a sufficient consideration to support a release. This decision also held that there must be a meeting of the minds of the parties to the agreement.

We respectfully submit that in the instant case there was no meeting of the minds. This is evidenced by the subsequent unauthorized filing of claims purportedly on behalf of these Respondents before the National Railroad Ad-

justment Board, by Williams. The same Williams who signed Exhibit "C" (R. 16), set up by the Petitioner as a release. He filed the individual claims for Respondents herein, unauthorized it is true, but we refer to it, to show that he himself, had not considered the letter a release of individual claims, thereby exemplifying the absence of a meeting of the minds, as exemplified by Williams' statement of claim (R. 29), filed with the "Board":

> "There were no agreements reached whereby payment for violation of Article No. 6 of the Yardmen's Agreement would be waived as a result of withdrawal of Labor Board Docket No. 3537. *In fact that case held no claim for payment for time.* It was simply a case to settle the dispute as to the carrier's right to force the yard crews in the Whiting yard to work at times other than the fixed starting time provided for in Article 6. Certainly there are no words in the agreement reached which implies in any manner that the committee waived the right to claim for payment for violations prior to withdrawal of the case from the Board." (Italics ours.)

(c) It is self-evident from the contents of the letter that it is not a release of the individual claims of respondents.

From an examination of said letter (R. 16), as a whole, it is obvious that there were many cases pending involving the payment of money, but the only question these Respondents had pending on Case No. 5 (R. p. 17) was a grievance—"starting time of switch engines in Whiting S. O. Yard." (R. 17, case 5.)

The question of liability of the Petitioner for the payment of money on individual claims of these Respondents and others, was not presented in Labor Board Docket No. 3537, was not set out in the letter (R. p. 17), nor by any wording in the letter attributable to Case No. 5.

This court is too well aware of the multitude of cases holding that the wording of a contract or a pleading is held most strongly against the person drafting the same. We submit that the Petitioner herein drafted the letter (Ex. "C") (R. 16), and that if it had intended that said letter should act as a release of the individual claims of the Respondents herein, assuredly with the legal talent at their disposal, they could, and would, have clearly expressed that thought in clear, legal, understandable language.

From an examination of the letter we find that it enumerates 61 separate cases then pending before the National Labor Adjustment Board, between the Brotherhood of Railroad Trainmen, represented by C. H. Williams as Chairman and one of the other members of the Grievance Committee, and the Petitioners herein. Eleven of these cases involved grievances, including Grievance Case No. 5. Fifty involved claims for money for eighty-five or more individuals. Of these fifty, four involved personal injury claims. (Cases Nos. 46, 47, 48 and 54, R. 16.) All the others were time claims.

After examining all of these claims, it is evident that the wording of the concluding part of the letter could only adjust and compromise the *claims* then pending before the Board and submitted for settlement or compromise. We repeat, that the only thing pending before the Board as contained in said letter affecting these Respondents was a grievance, namely, to compel the Petitioner herein to abide by the terms of Article 6 of the agreement. (R. 14, Doc. No. 3537.) The question of liability of the Petitioner for the payment of individual claims to some of the Respondents herein was not presented to the "Board," enumerated in Case No. 5, discussed by the parties, mentioned in the letter specifically, nor by inference.

The fact that no one considered this letter as a release

of individual claims, we believe is evidenced by Williams a short time thereafter (R. p. 26) filing the unauthorized claims before the "Board," this, several months after the letter of October 31, and without the required authority of the local lodge, nor the Respondents, and without their knowledge.

We submit that it is self-evident that "claims" refer to claims for money, Ex. B (R. 15), as distinguished from "protests" or grievances as understood in the trade, and we therefore respectfully submit that neither the B. of R. T., nor the officials thereof, had the power or the right to compromise or waive any individual claims of the Respondents herein. The Petitioner was aware of the limited authority of Williams as Chairman of the B. of R. T., yet it interposed the letter as a release, when for the reasons heretofore stated there was no authority vested in Williams and Johnson to execute the same; the purported release was not executed by the three men required by the By-Laws of the B. of R. T.; there was no consideration to the Respondents, and the letter itself, from its contents does not purport to be a release of claims of these Respondents.

For this letter of October 28, 1938, to be a valid and substantial release of the claims of the Respondents herein, it is legally necessary that the following be present.

1. That there be competent parties.

We submit that we have shown the lack of authority in Williams and Johnson to act for or on behalf of the Respondent's individual claims. They were not the properly constituted committee provided for the purpose, by the B. of R. T.

2. There must be a proper subject matter.

We believe it is obvious that in the wording of the letter that the only matter pending between the parties and

before the "Board" was the grievance to compel the railroad, Petitioner herein, to abide by Article 6 of the Agreement. That subject matter cannot be transmuted to include the personal claims of these Respondents. There is therefore no proper subject matter.

3. Consent, or a meeting of the minds of the parties.

We believe we have illustrated that Williams himself, one of the parties to the Agreement, did not consider the letter a release of individual claims.

4. There must be a consideration.

Even the Petitioner, in the lower court, did not suggest that there was any consideration moving to these Respondents, from the Petitioner to validate the would be release. (See *Ferryboatmen's Union* v. *N. W. P. Ry. Co.*; 84 Fed (2d) 773.)

Petitioner herein seeks to overcome all of the legal requirements of a well ordered and law abiding society, by its all embracing "collective bargaining"; such was not the intent nor purpose of unionism in America. And we respectfully submit that collective bargaining consists of obtaining rights, good working conditions, fair wages and just consideration for its members by the Unions, rather than the overriding of all legal precedent and the forfeiting of the members' individual rights.

III.

The award of the National Railroad Adjustment Board refusing to give effect to the individual claims of the Respondents herein is not res judicata of said individual claims.

(a) The Board had no jurisdiction of the individual Respondent's claims herein because there was no authority vested in C. H. Williams to present the same.

As stated in the affidavit (R. 45) the only authority vested in the General Grievance Committee, of which C. H. Williams was Chairman, was to present a grievance to the "Board" to force the Petitioner to comply with Article 6 (R. pp. 47, 48, paragraphs 11, 13, 14, 15, 16 and 19).

As heretofore enumerated under Point II (a), under the Constitution and By-Laws of the B. of R. T. of which the Petitioner had knowledge, the General Grievance Committee and the General Chairman have limited authority. The cases and argument quoted under that point are applicable to the instant point, so we will not burden the court with a repetition thereof. However, we wish to state that under Rule 5 (Exhibit "G" heretofore filed herein under order of July 26, 1941) certain steps are necessary before any grievance or claim can reach the General Chairman, which was not done in the case decided by the National Railroad Adjustment Board upon which the Petitioner has pleaded *res judicata* (R. p. 26).

Certainly, a switchman, uneducated in the ways of law, releases, and authority, should not be held to have any greater power than an attorney at law, who is supposedly more learned in reference to rights and liabilities, and this court we believe without any citation being necessary will agree that an attorney without authority and without the

knowledge or consent of a client could not file a suit in his behalf and bind the client thereby.

We submit that in the instant case, the General Chairman C. H. Williams who took it upon himself to file individual claims for these Respondents without their knowledge or authority, cannot be held by that action to bind them.

If Williams did not have the authority to file the claim, then it must necessarily follow that the "Board" did not have jurisdiction of the claims nor of the parties. If they did not have jurisdiction then any order or award or refusal of award that might be entered by them would be void.

In the case of *Piercy* v. *Louisville Railway*, 248 S. W. 1042, the court held at page 1045:

> "The officers of such organizations (union) are, as to the individual rights of its members not to be deemed as their agents."

We wish to reiterate that the authority given to the representatives under the Act and under the constitution of the Brotherhood does not anywhere include the right to representation for "claims for pay or claims for breach of contract," but, on the contrary, only disputes concerning rates of pay, rules or working conditions.

We wish to submit the consensus of authority on this point as evidenced by 63 Corpus Juris, page 663, Par. 14:

> "A trade union is not the agent of a member for the purpose of waiving any personal right he may have, but only for the limited purpose of securing for him, together with all other members, the objects of the union."

The lower court, before whom this case was decided, previously held in the case of *Griffin* v. *Chicago Union Station*, 13 Fed. Supp. 722, p. 724, upon a claim that the member was represented before the "Board" by the Union; that

such was not the fact, that no notice had been given the complaining member as to his individual rights, and that those rights could not be waived or impaired by the action of the Union officials before the "Board." The same legal principle should have been applied in the instant case.

The Respondents do not deny that the officials of the Brotherhood were authorized to file a complaint before the "Board" to compel the Petitioner to adhere to Article 6 of its labor agreement. The officials' authority was limited to this act and purpose. The agency created was a limited or specific agency and was to be terminated as soon as the purpose for which the agency was created was served. The Petitioner apparently fails to realize that the authority which was conferred upon the aforesaid officials by the Respondents concerned the "specific performance" of Article 6 of the labor agreement and did not concern the individual rights of the various Respondents, the said individual rights of the Respondents arising out of the breach of the labor agreement by the Petitioner.

It is a well established legal principle that an agent who is appointed for a particular purpose is a special agent and his authority must be strictly construed and must be measured by express direction given by the principle. A person who deals with a special agent is ordinarily bound to ascertain the scope and extent of the special agent's express authority. See *N. Y. Life Ins. Co.* v. *Horton*, 9 Fed. (2nd) 320; *Monson* v. *Kill*, 144 Ill. 248; *Burba* v. *Baltic American Line*, 233 Ill. App. 132

(b) Respondents had no notice of any hearing nor of the pendency of any hearing.

As specifically set out in the U. S. C. A. 45 par. 153 (j),

> "Parties may be heard either in person, by counsel, or by other representatives, as they may respectfully elect, and the several divisions of the Adjustment

Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to th m."

We respectfully submit that the statute is mandatory upon the "Board" to give notice of all hearings to the employee involved in any dispute before them.

Nord v. *Griffin*, 86 Fed. (2d) 481, involves seniority rights which had been denied by the decision of the "Board", because of the unauthorized action of the Brotherhood in the presentation of the case. The Court held that by reason of lack of notice of the hearing, the employee was not accorded due process of law as guaranteed by the Fifth Amendment to the Constitution and, therefore, the order of the "Board" was void.

We respectfully submit that the instant case is in this respect analogous to the decision in the Nord case and that, therefore, the denial of the award by the "Board" in the instant case is void for lack of notice to these Respondents. (R. 48, par. 17, 18.) This fact is uncontroverted yet the Petitioner evades the same in their brief and seeks to gloss over it by the statement that "collective bargaining" justifies disregarding thereof, and states that the notice to the Union representative is sufficient.

(c) The award of the National Railroad Adjustment Board is not final because the statute under which said Board operates specifically excepts money awards from being final.

Even if these Respondents had given authority to the General Grievance Committee to file individual claims for them before the National Railroad Adjustment Board, and even though they had notice and knowledge of the pendency of said hearing, the award would still not be final. As our authority for said statement we submit that the Statute un-

der which said "Board" operates (U. S. Code Ann., Title 45, par. 153, sub-par. M) states:

> "and the award shall be binding upon both parties to the dispute except insofar as they shall contain a money award."

Petitioner construes this clause literally and submits to the court the proposition that unless an employee is actually awarded a cash sum by the Adjustment Board, the findings of said "Board" are final and binding and the employee has no right of review. We submit that the word "contain" as used in the statute actually means "concern," and that the statute should be construed to read, that the awards shall be final and binding, "except insofar as they shall *concern* a money award."

If Petitioner's contention is correct, it would mean that an employee who had petitioned the "Board" for a money award and who was unsuccessful in obtaining such an award, could not have the ruling of the "Board" reviewed. According to the reasoning in *Washington Terminal* v. *Boswell*, 124 F. (2d) 235, this is a violation of due process and the statute would be unconstitutional.

This Court is undoubtedly well familiar with the rule that if a statute is capable of two constructions, the courts will adopt a construction that will make the statute constitutional and valid. Therefore, we submit that our suggested construction of the statute should be adopted and followed.

Certainly, the award asked for by Williams was a money award, and though it was not awarded, it "contained" or "concerned" a money award.

As was stated in the case of *Illinois Central* v. *Moore*, 112 Fed. (2d) 959, at page 966 (reversed on other grounds, 61 S. Ct. 754):

> "The individual on his individual contract of em-

> ployment may seek reinstatement with pay through the railroad officers on through the Board, or he may, *before or after* pursue those remedies, acquiesce in the discharge, and ask damages for a breach of contract at law." (Italics ours.)

The court stated also in that case (p. 964), in referring to the handling of grievances or claims—

> "and then may be referred to the Adjustment Board. Awards are final except as to a money award." (Citing authorities.)

In the case of *Stephenson, et al.* v. *New Orleans & N. E. Ry. Co.*, 177 So. 509, wherein an award of the "Board" was pleaded as a defense, as in the instant case, the court said, p. 517:

> "Congress did not empower the Board to impair the obligations of an existing contract or to disturb the harmonious relations existing between a carrier and its employees."

It further states, p. 519:

> "Then most assuredly the employees of a carrier against whose interest and seniority rights an award has been made are not left without remedy in all the courts of the land."

And in commenting on the right of an employee to go to a court for relief despite an adverse decision by the "Board," the court states, p. 519:

> "Such an employee who has lost his cause before the Board must necessarily resort to a state court of competent jurisdiction or lose the property rights involved in a seniority contract with his employer, unless other Federal grounds are present."

We submit that in the instant case other Federal grounds were present, and we have appealed to the Federal Court for the assertion of a private right that could not be revoked by the adverse decision of the National Railroad Adjustment Board.

To the same effect see also:

System Federation v. *La. Ry.*, 119 Fed. (2d) 509.

See also:

Rentschler v. *Missouri Pacific Ry.*, 253 N. W. 694.

IV.

The Section of the Railway Labor Act Which Provides That the Award of the Adjustment Board Is Final and Binding, Except When the Same Contains a Money Award, Violates the Due Process Clause of the Fifth Amendment to the Federal Constitution

We wish to respectfully point out to the court that under the Act under which the National Railroad Adjustment Board functions (U. S. Code Ann., Title 45, par. 153), when an award is entered against the employer and he refuses to comply therewith, it is necessary for the employee to file a suit at law, which is a trial *de novo*. The employer in that suit may set up any defense that he chooses, and in effect, obtain a review of the decision of the "Board."

If, however, the employer is successful before the "Board", and the award is entered against the employee, if said award is to be held a final adjudication of the rights of the party then there is no further remedy afforded to the employee.

This situation affords the employer a right of review of the decision of the "Board", and refuses the same right of review to the employee. We respectfully submit that this inequality violates the due process clause of the Fifth Amendment to the Constitution of the United States.

In the case of *Washington Terminal Co.* v. *Boswell*, 124 Fed. (2d) 235, on page 244, the court said:

> "Though the effects of an award favorable to an employee are substantial, they do not conclude the employer's rights."

"The Board cannot enforce its awards. That is left for the courts to do. It can be done only in a suit *de novo*. In the suit the cause of action is upon the award, to secure its enforcement. But the parties are not limited by its provisions in the trial. The employee must set forth "the causes for which he claims relief" and the Board's order. 45 U. S. C. A. Sec. 153, First (p). The suit must "proceed in all respects as other civil suits," except that the order and findings "shall be prima facie evidence of the facts therein stated." Ibid. The carrier is limited in no way as to its defenses or the evidence it may wish to present. Its day in court in the enforcement suit is a full one . . . The short answer, therefore, to the argument that the administrative proceeding is wanting in due process is that, if so, this is entirely immaterial. Any failure in this respect is cured by the full and complete opportunity which the carrier is given in the enforcement suit to make its defense under all procedural and substantive guaranties of the Constitution."

This quotation unequivocally illustrates that an adverse decision by the "Board" does not conclude the employer's rights. On the other hand, however, an adverse decision by the "Board" against the employee does conclude the employee's rights.

On page 245, of the *Boswell* case, the court states,

"If the statute creates inequality in this respect, it is perhaps the other way. When an award is unfavorable to an employee, the statute makes no provision for him to challenge it by suit to set it aside or otherwise. So far as appears from the Act's explicit terms, the Board's decision is final. We need not determine whether the statute is conclusive in this respect or, if so, whether it would be so far invalid. In other words, the question is not before us whether an employee can maintain a suit for relief independent of the statute and of the award, after he has submitted

his case to the Board and received its adverse decision. That the statute, if applied literally in this respect, might be invalid as to the employee and that he might, therefore, have independent relief, does not mean that it would be invalid as to the carrier or that it should have such relief from the Board's adverse decision. Their situations are entirely different and so are the effects upon their rights of the award and of absence of opportunity to institute suit to review it. The employee's rights would be foreclosed, if the award against him were final. The employer's position, on the other hand, is much different."

On page 246, the court said,

"And in this lies a stronger answer. It is the fact that unless the employee institutes an enforcement suit, the carrier cannot be prejudiced in any legal sense by the absence of an opportunity to sue. The only purpose of such suit would be to set aside or nullify the award. But this is not necessary for adequate protection of the carrier's rights. The award is not self-enforcing or enforceable by the Board. It is merely a decision that the carrier should change its operating practice in the manner specified. It has the power of management and if it regards the award as contrary to its rights, it can maintain the existing practices. The act confers upon the employer the powerful advantage of the defensive position in regards to the award. It places the burden of enforcement upon the employee. It limits the time within which he may act. The period allowed is not unreasonable. If he does not act within it, presumably his right to do so is gone. If not, he loses at any rate the special advantages of the statutory suit."

This quotation clearly illustrates the respective positions of a losing employer and a losing employee before the Adjustment Board. If there is an award against the employee by the Adjustment Board, he can, for all practical purposes, disregard the same because it is of no effect

whatsoever as far as he is concerned. On the other hand, if the "Board" makes any finding against the employee, the adverse ruling of the "Board" may constitute a complete destruction of the employees property rights.

On page 246, the court said, in speaking of the carrier's rights,

> "In all this there is no essential unfairness. Certainly, there is none beyond the power of Congress to create in the regulation of such complex economic matters. The carrier is at full liberty to accept and comply with the award, or to reject and disregard it. If he chooses the latter course, the award has no effect upon its rights unless the employee institutes and succeeds in a suit to enforce it. If he does so, the carrier receives full constitutional protection in the suit."

In most instances, when a finding of the "Board", is against the employee, the latter loses certain property rights, and at the same time certain rights are given to the employer which he did not have prior to the decision or finding of the "Board". The employee has but one alternative, to accept the award of the "Board". On the other hand, if there is a decision against the employer, he has the choice of either accepting the award of the "Board" or rejecting the same. He does not have to comply with the award unless the employee files a suit in Court, predicated on such an award, and obtains the sanction of the Court. In other words, in the absence of any suit by the employee to enforce an award of the "Board" which is adverse to the employer, such award is absolutely meaningless. The statute denies the employee the more usual advantages of administrative decision, namely, immediate effectiveness, unless stay is secured, limitation of judicial review to questions of law, enforcement by public authority, etc. It gives him only decision, not action, by the "Board".

It puts upon him the whole burden of enforcement. If the employer has had his day before the "Board", and after it has lost, he is only confronted by an order, non-enforceable, except by suit. In fact, the employer is not only not denied his day in court, in the hearing before the "Board", but he is given another opportunity to have his day in court in the suit brought to enforce the award.

On page 251, the court said:

> "Finally, this is a suit for a declaratory judgment. The remedy is discretionary. We do not believe a carrier, consistently with the Railway Labor Act, could maintain a suit in equity to set aside an award or enjoin its enforcement. The statute seems clearly to exclude such suits by specifying enforcement suits solely as a *method of review*." (Italics ours.)

In the dissenting opinion of Justice Stephens, on page 269, the following statement is found:

> "It would seem more logical to conclude that it would hardly have been the intention of Congress to exclude either the employees or the carrier from recourse to the courts for a determination of their contract rights, whether or not they lost before the Board. Indeed, the argument that the carrier can not have recourse to the Courts because employees losing before the Board cannot sue either under the Act or at all begs the very question in issue, to wit, whether the procedure provided for by the Labor Act is exclusive."

The decision in the *Boswell* case was sustained by this Court by an evenly divided opinion, Justice Rutledge not taking any part in the rendition of the opinion. This, we submit, should be indicative of the Court's attitude in the instant case. Despite the fact that the Railway Labor Act does give the employer the right of review (enforcement suit), four of the Justices of the Supreme Court felt that he should be given an additional or a more direct

right of review of the "Board's" award. Since this is the fact, we may reasonably conclude that the court should certainly favor the employees in the instant cause, who are not given any right of review whatsoever, by the Act in question.

This feeling about the unfairness of the Act to the employee is concurred in, in the case of *Stephenson* v. *New Orleans & N. E. Ry. Co.*, 177 So. 509, at page 519:

> "Neither the carrier nor the employee against whose interest an award has been made, is given any right under the Act to go into the United States District Court as a party plaintiff or complainant."

Also, the District Court in the case of *Lane* v. *Union Terminal*, 12 Fed. Supp. 204, at page 205, states:

> "The act is silent, insofar as authority is concerned, for any person to enter the national court, save and except the 'petitioner' or 'any person for whose benefit such award was made'. The defeated had no right to enter court. He is given no privilege of court review. It must be assumed that the right of the court to 'enforce the order or set aside the order' will be taken upon the application only of the parties who are permitted to enter court."

To the same effect, see also, *Cook* v. *Des Moines Union Ry. Co.*, 16 Fed. Supp. 810.

REPLY TO BRIEF OF PETITIONER.

We have shown that if it is found that the award of the "Board" denying the claims of the Respondents is final, then Sections 153 (m) and (p) of the Railway Labor Act are unconstitutional. (Brief.)

On page 15 of its brief, Petitioner states that "Notice to the duly constituted officers of the Brotherhood is sufficient," and cite *Estes* v. *Union Terminal Co.*, 189 Fed. (2d) 768, in support of their statement.

Section 153 (j) of the Railway Labor Act provides:

> "Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board *shall give due notice of all hearings to the employee or employees and the carrier or carriers* involved in any disputes submitted to them." (Italics ours.)

In *Estes* v. *Union Terminal Co.*, *supra*, the Circuit Court of Appeals stated that it is absolutely imperative that an employee involved in any controversy before the "Board" be given notice of the hearing, and that in cases involving two large groups of employees, notice to the duly constituted officers of the organization would *generally* be sufficient. The case at bar does not involve large organizations of employees. The Court in stressing the importance of giving notice to an employee of a hearing before the "Board," stated:

> "* * * illustrates how a single employee may be caught between the upper and nether mill stones in a controversy to which only a labor organization and a carrier are parties before the board."

The *Estes* case does not lay down the positive rule of law that the serving of notice upon officials of a union is sufficient compliance with the terms of the Railway Labor Act as the Petitioner would have us believe. In fact, if any inference is to be drawn from the case, it should be to the contrary.

Petitioner places great emphasis on the case of *Berryman v. Pullman Co.*, 48 F. S. 542, which it cites on page 16 of its brief. The facts of that case are not analogous to the facts of the instant cause. In the *Berryman* case, the defendant filed an affidavit in support of its motion for a summary judgment, and the plaintiff admitted all the facts alleged in said affidavit. The plaintiff was properly represented before the "Board" and there was no question present involving the authority of his representative. There was no question present involving the jurisdiction of the "Board" over the subject matter and the parties to the action. There was no question present involving the giving of notice of the hearing by the "Board", to the parties to the suit. Finally, the *Berryman case* is a District Court case.

On page 28 of its brief, the Petitioner contends that the Respondents are not entitled to judicial relief because they have failed to exhaust their remedies before the tribunals of the Brotherhood.

The law is well settled that a person is not required to perform a useless act. The Respondents had no knowledge of the execution of the letter of October 28, 1938, nor of the filing of their individual claims before the "Board", until after the rendition of the adverse decision by the "Board."

Does the Petitioner wish to contend that after the "Board" decided the claims adversely to the Respondents herein, the latter should have sought relief before the

tribunals of the Brotherhood? Any such action by the Respondents would have been absolutely useless. We reiterate that the law does not require a person to perform a useless Act.

Petitioner, throughout its brief, attempts to inject collective bargaining into the case. We submit that collective bargaining is irrelevant to the issues. Collective bargaining pertains to the collective rights of labor and not to the individual rights of individual employees for damages.

In the case of *Moore* v. *Illinois Central Railroad Co.*, 312 U. S. 360, this Court declared that an employee has the election of filing his claim or grievance with the "Board", or filing it in a court of law. This right of election given to the employee negatives the contention of the Petitioner regarding collective bargaining.

Section 153(j) of the Railway Labor Act provides that in a hearing before the "Board",

> "Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, * * *."

Section 151 of the Act provides, in part,

> "The term "representative" means any person or persons, labor union, organization, or corporation designated either by a carrier or group of carriers or by its or their employees, to act for it or them."

By virtue of these two sections of the Act, an employee can represent himself before the "Board", or choose any representative he desires, his choice not being limited to a union organization, or to a union official or member. The very language and tenor of the Act negatives the argument of the Petitioner that collective bargaining is an issue in the instant cause.

On page 26 of its brief, Petitioner cites the case of *Smith, et al.* v. *Texas N. O. R. Co.*, 118 Fed. (2d) 75, as

supporting its theory that when a compromise agreement is executed with the designated representatives of the employees, all employees are bound thereby, and that the principles of common law agency are not applicable.

The quotation which the Petitioner cites from the *Smith* case glaringly illustrates its miscomprehension of the law enunciated in that case. The representatives of the union were not acting as agents of the decedent, but were acting as agents of the children of the deceased. The Court said,

> "The jurisdiction is persuasive that *they* were on notice and were *represented;* and, therefore, *their* rights were decided at the compromise between the employees as a group and the carrier." (Italics ours.)

The children of the deceased were properly represented by agents, and a careful reading of the quotation cited by Petitioner discloses that the children of the deceased may have been estopped from attacking the settlement. They had been given notice and did not act upon the same. The conclusion which the Petitioner draws from the *Smith* case is unwarranted.

Petitioner's arguments on the other points of its brief, we submit have been answered by our summation of the law in the brief, hence we shall not repeat them.

Conclusion.

We, therefore, respectfully submit that the Petitioner herein, presents no justiciable right to reverse the decision of the United States Circuit Court of Appeals; that they have correctly decided the issues presented and that this judgment should be affirmed.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

No. 160.—October Term, 1944.

Elgin, Joliet and Eastern Railway Company, Petitioner, *vs.* G. W. Burley, et al.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

[June 11, 1945.]

Mr. Justice Rutledge delivered the opinion of the Court.

This cause, arising upon an amended complaint;[1] brings for decision novel and important questions concerning the authority of a collective bargaining representative, affecting the operation of the Railway Labor Act of 1934. 48 Stat. 1185, 45 U. S. C. § 151 ff. The ultimate issues are whether such an agent has authority, by virtue of the Act or otherwise, either to compromise and settle accrued monetary claims of ten employees or to submit them for determination by the National Railroad Adjustment Board to the exclusion of their right, after the settlement and after the Board's adverse decision, to assert them in a suit brought for that purpose. The claims are for "penalty damages" for alleged violation of the starting time provisions of a collective agreement, varying from $3,500 to $14,000, and in the aggregate amounting to $65,274.00.[2]

The District Court rendered summary judgment for the carrier, holding that the Board's award was a final adjudication of the claims, within the union's power to seek and the Board's to make, precluding judicial review.[3] The Court of Appeals re-

[1] Amendments were allowed to cure jurisdictional defects found to exist upon an earlier appeal. Alderman *v.* Elgin, Joliet & Eastern Ry. Co., 125 F. 2d 971.

[2] The record sets forth no provision for penalty damages. But the complaint alleges that under the terms of the agreement each of the plaintiffs is entitled to "pay for an additional day, at time and one-half, at the regular daily rate" for each day he was required to work contrary to the agreement's terms.

[3] The court said: "I think that the controversy was submitted to the Board, that it had jurisdiction and that it was decided, and that the plaintiffs were represented there and are bound thereby. . . . I think the ruling of the Adjustment Board was binding upon the plaintiffs as well as upon the defendant, and that it is binding on this court in this proceeding."

versed the judgment, 140 F. 2d 488, holding that the record presented a question of fact whether the union had been authorized by respondents "to negotiate, compromise and settle" the claims. We granted certiorari, 323 U. S. —, in order to resolve the important questions affecting application and operation of the Act.

A statement of the more important facts will put the issues in sharper perspective. The controversy relates to operations in petitioner's so-called "Whiting Yard." Prior to July 24, 1934, respondents, or some of them, were employed by the Standard Oil Company to do private intraplant switching in its Whiting, Indiana, plant. On that date this work was taken over by petitioner. Until then Standard Oil's switching crews began work each day at hours fixed in advance by the management, which varied as plant operations required.

Prior to 1934 petitioner's crews at all yards in Indiana and Illinois began work daily in accordance with starting time provisions contained in Article 6 of a collective agreement made in 1927 between petitioner and the Brotherhood of Railroad Trainmen, governing rules, working conditions and rates of pay of yardmen.

Upon transfer of the Whiting yard switching to petitioner, respondents theretofore employed by Standard Oil became employees of petitioner and members of the Brotherhood. On July 24, 1934, company officials conferred with representatives of the engineers, the firemen and the yardmen concerning terms of employment. The Brotherhood acted for the yardmen. Apparently agreement was reached on all matters except starting time but, as to that, versions of what transpired differ. Respondents and the Brotherhood have maintained that the 1927 agreement, including Article 6, became applicable to them upon the transfer. They say, however, that they assented to a suspension of Article 6 for thirty days from July 27, 1934, to enable the company to work out adjustment to the plant's operations, and accordingly it governed their relation with petitioner from August 26, 1934.

The company has insisted that Article 6 did not become applicable to respondents upon the transfer and that it made no agreement to apply Article 6, other than to follow it as closely as possible, prior to October 31, 1938, when it and the Brotherhood eventually agreed to place Whiting yard crews on fixed starting time, under circumstances to be noted.

Whichever version is true, a long controversy resulted. The carrier continued to follow the former practice, although departures from the schedule were reduced, as it claims, in conformity with the oral undertaking to observe it as far as possible. The work went on without interruption. But numerous complaints on account of departures were made through local officers of the Brotherhood. Time slips were filed by the employees. Frequent negotiations took place. None however resulted in a settlement prior to October 31, 1938.

In this state of affairs, respondents authorized the Brotherhood to file complaint with the National Railroad Adjustment Board for violation of Article 6. This was done on November 23, 1936. The "statement of claim" was signed and filed by Williams, chairman of the general grievance committee. It asserted that the carrier, having "placed the employees under the agreement of the yardmen," had "failed to put into effect the starting time provisions" of Article 6, and denied that violation was justified either because the carrier had agreed with the Engineers to follow the formerly prevailing practice or by the carrier's claim that the work could be done in no other way. The submission was intended to secure compliance. There was no prayer for money damages. Petitioner maintained that Article 6 was not applicable.

The Board, following its customary procedure,[4] docketed the claim as No. 3537, notified the carrier and the union that the case, with many others docketed at the same time, was "assumed to be complete," and forwarded to each copies of the other's submissions. The record does not disclose what followed until nearly two years later.

On October 31, 1938, Williams and Johnson, secretary of the Brotherhood, two of the grievance committee's three members, accepted an offer made by petitioner's president, Rogers, to settle the claim. The settlement took the form of a proposal, made in a letter by Rogers to Williams, to settle some 61 different claims, including "Labor Board Docket No. 3537—Starting time of

[4] The procedure, though informal, consists principally in written statements or "submissions" filed by the parties, which perform the functions of pleading and evidence combined, and oral argument upon the submissions thus made. See Garrison, The National Railroad Adjustment Board: A Unique Administrative Agency (1937) 46 Yale L. J. 567, for a detailed description of the procedure. See also Final Report of the Attorney General's Committee on Administrative Procedure (1941) 185 *ff.*; Administrative Procedure in Government Agencies, Sen. Doc. No. 10, Part IV, 77th Cong., 1st Sess.

switch engines in Whiting S. O. Yard." Williams and Johnson endorsed acceptance for the Brotherhood and the yardmen on the letter. Because of its importance, pertinent portions are set forth in the margin.[5] On the day the settlement was concluded Rogers and Williams advised the Board of it by letter and jointly requested that the case be withdrawn from the docket, which accordingly was done.

Notwithstanding the settlement, a further dispute arose. In March, 1939, the Brotherhood, through Williams, requested the carrier to furnish a complete list of crews in the Whiting yard started at times other than those fixed by Article 6 from August 27, 1934, to November 15, 1938, when the settlement became effective. The company declined to furnish the list, stating it was at

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[5] The letter was addressed to Williams, as general chairman of the Brotherhood, and dated October 28, 1938. It stated:

"Since my letter of August 18th in which I tentatively proposed settlement of certain matters of grievance we have had further correspondence and conferences which have modified our decision in some cases. Therefore, in order that the whole matter be placed in concrete form I am outlining below our proposals to settle all of the cases except as otherwise specified.

"Case No. 5—Labor Board Docket # 3537—Starting time of switch engines in Whiting S. O. Yard.

"Settled by agreement that *the starting times for a ninety day trial period* commencing November 15th, 1938, *shall be the times provided for in Article 6* of the Yardmen's Agreement *instead of the starting times heretofore agreed upon and now being followed.* If at the end of the ninety day trial period the Railway Company or its employees claim that the starting times as fixed in Article 6 do not result in efficient and economical operation and in satisfaction to our employees and to the industry served, then representatives of the Railway Company and representatives of the Yardmen, and representatives of the Engineers and representatives of the Firemen *will sit down and work out a schedule of starting time best suited for meeting the special requirements of the industry.*

"We have by this letter given you a complete resume of all of the claims which have not heretofore been disposed of, filed by you on behalf of the employees whom you represent and have proposed in this letter a very liberal disposition of all the cases involved. The settlements proposed are predicated on *a complete settlement and withdrawal of all cases now pending* either before the board, *or under discussion with this office except Case No. 4*, which it is understood will be left to a decision by the National Railroad Adjustment Board, *and it is further understood that in the event these settlements are accepted that the claims listed in this letter cover all claims of a similar nature, and that no other claims covering the same or like situations will be presented when such claims arise from causes occurring prior to the date of this settlement.* [Emphasis added]

"Yours truly,

"S. M. Rogers, President.

"Accepted for the Yardmen: Oct. 31, 1938.

"C. H. Williams, General Chairman, B. of R. T.

"S. F. Johnson, Secretary, B. of R. T."

a loss to understand the reason for the request in view of the settlement.

The upshot of the dispute was the filing of another claim with the Board, Docket No. 7324, on May 1, 1939, by Williams, acting for the Brotherhood. This submission was "for one day's pay at time and one-half for each foreman and each helper for each day they were required to work in yard service in the Whiting (Standard Oil Company) Yard, in violation of the fixed starting time provided for in Article No. 6 of the Yardmen's Agreement . . . effective January 1, 1927, and applicable to Whiting (Standard Oil Company) Yardmen, July 27, 1934, from dates of August 27, 1934, until November 14, 1938, inclusive."

The submission not only maintained the applicability of Article 6 and accrual of the individual claims asserted. It also maintained that the settlement of October 31, 1938, was effective only to fix the starting time for the future and had no effect to waive or determine individual claims for penalty damages accrued prior to the settlement.[6]

The carrier's submission reiterated its position in Case No. 3537. It also relied upon the settlement as precluding later assertion of any claim, individual or collective, based upon occurrences prior to the date of the settlement.

The matter went to decision by the Board. Under the procedure prescribed in case of deadlock, cf. § 3 First (l), a referee was called in. The award was made by the First Division on September 6, 1940. It sustained the Board's jurisdiction,[7] found that "the parties to said dispute were given due notice of hearing

[6] Cf. note 5. The submission stated: "There were no agreements reached whereby payment for violation of Article No. 6 of the Yardmen's Agreement would be waived as a result of withdrawal of Labor Board Docket No. 3537. *In fact that case held no claims for payment for time. It was simply a case to settle* the dispute as to *the carrier's right to force the yard crews* in the Whiting yard *to work at times other than the fixed starting time* provided for in Article 6 . . .

"As stated before, Case No. 5—Labor Board Docket No. 3537 *contained no claim for pay* to Whiting Yardmen. *Consequently it was not a question before the Management and the Committee in the* starting time *negotiation* and claim cannot be made that a waiver was made on a matter which was not negotiated."

The submission also denied that oral agreements relating to starting time, claimed by the carrier to have been made at the time of the transfer in 1934, could be effective "to invalidate the prescribed written rule of Article 6." Williams however did not question the validity of the verbal agreement, as he maintained, for the thirty day suspension.

[7] The submissions in no way challenged the jurisdiction of the Board or of the Division.

thereon," and held that "the evidence shows that the parties to the agreement disposed of the claim here made by the letter of carrier dated October 28, 1938, accepted by employees October 31, 1938." Accordingly the claim was "denied per findings."

Thereafter, on November 19, 1940, the present suit was instituted. As has been noted, the case comes here after a summary judgment rendered on the carrier's motion, supported by the affidavit of its vice president. This in effect set up the compromise agreement and the award in Case No. 7324 as bases for the judgment sought.

The range and precise nature of the issues may be summarized best perhaps as they were shaped upon respondents' opposition to the carrier's motion. They denied that either Williams or the union had authority to release their individual claims or to submit them for decision by the Board. They relied upon provisions of the Brotherhood's constitution and rules,[8] of which the carrier was alleged to have knowledge, as forbidding union officials to release individual claims or to submit them to the Board "without specific authority to do so granted by the individual members themselves"; and denied that such authority in either respect had been given.

The validity and the conclusive effect of the award were challenged also upon other grounds, among them that respondents individually received no notice of the submission or the hearing until after the award was made; that since the award denied a claim for money damages, it was within the exception of Section 3 First (m), which provides that "the awards shall be final and binding upon both parties to the dispute, except in so far as they shall contain a money award," and therefore did not preclude this suit; and that the Act, if construed to make the award conclusive, would violate the Fifth Amendment's due process provision by denying judicial review to defeated employees, though allowing it to defeated employers. Cf. § 3 First (p), (q); *Washington Terminal Co.* v. *Boswell*, 124 F. 2d 235, affirmed by an equally divided Court, 319 U. S. 732.

Finally respondents suggested most sweepingly that the Board

[8] See Part III. The provisions regulate the union's internal procedure in relation to making changes in a "general or system wage schedule or agreement," Rule No. 3, and that to be followed when the local chairman or grievance committee fails "satisfactorily to adjust any grievance referred to it." Rule No. 7. The latter includes a provision that "a general grievance committee may authorize their chairman to handle all grievances received from local lodges." See also note 40.

may act "merely as an arbitrator," with the result that "any decisions thereunder are void because it passes on matters and bases its decision and its opinion on law and fact which is contrary to public policy." The prayer was that the court overrule the carrier's motion for summary judgment and, in doing so, determine that the release was not effective; the award was not a final adjudication of the claims; and the award was void for lack of jurisdiction of the parties or the subject matter or "because said Act under which award was entered is unconstitutional."

The District Court's judgment rested squarely on the conclusive effect of the award in Docket No. 7324. It did not indicate whether it regarded the Brotherhood's authority to submit the claims and appear for the employees as derived from the statute or, apart from the statute, as a matter of law upon the particular facts. But it must be taken to have held that, upon the pleadings and the affidavits, no genuine issue of material fact was presented, Fed. Rules Civ. Proc., Rule 56(c), and therefore that it was immaterial if, as alleged, respondents had not individually given the Brotherhood or Williams specific authority to submit their claims for decision or represent them in the hearings.

The Court of Appeals, however, made no reference to the issues concerning the award and its effect upon the claims. But its judgment must be taken to have determined implicitly that none of petitioner's contentions in these respects is valid.

The issues are not merely, as the Court of Appeals assumed, whether the Brotherhood had authority to compromise and settle the claims by agreement with the carrier and whether on the record this presents a question of fact. For petitioner insists, and the District Court held, that the award of the Board was validly made, and is final, precluding judicial review. We do not reach the questions of finality, which turn upon construction of the statutory provisions and their constitutional validity as construed.[9] Those questions should not be determined unless the award was validly made, which presents, in our opinion, the crucial question. Respondents attack the validity and legal effectiveness of the award in three ways. Two strike at its validity on narrow grounds. Respondents say the Brotherhood had no power to submit the dispute for decision by the Board without authority

[9] Cf. § 3 First (m), (o), (p), (q).

given by each of them individually and that no such authority was given. They also maintain that they were entitled to have notice individually of the proceedings before the Board and none was given.

The third and most sweeping contention undercuts all other issues concerning the award's effects, whether for validity or for finality. In substance it is that the award, when rendered, amounts to nothing more than an advisory opinion. The contention, founded upon language of the opinion in *Moore* v. *Illinois Central R. Co.*, 312 U. S. 630, regards the Act's entire scheme for the settlement of grievances as wholly conciliatory in character, involving no element of legal effectiveness, with the consequence that the parties are entirely free to accept or ignore the Board's decision.

At the outset we put aside this broadest contention as inconsistent with the Act's terms, purposes and legislative history.[10] The *Moore* case involved no question concerning the validity or the legal effectiveness of an award when rendered.[11] Nor did it purport to determine that the Act creates no legal obligations through an award or otherwise. Apart from the affirmance by equal division in *Washington Terminal Co.* v. *Boswell*, *supra*, both prior and later decisions here are wholly inconsistent with such a view of its effects. Cf. *Virginian Ry. Co.* v. *System Federation*, 300 U. S. 515; *Texas & N. O. R. Co.* v. *Railway Clerks*, 281 U. S. 548;[12] *Switchmen's Union* v. *National Mediation Board*,

[10] Cf. Part. I.

[11] It was held that nothing in the Act "purports to take away from the courts the jurisdiction to determine a controversy over wrongful discharge or to make an administrative finding a prerequisite to filing a suit in court," 312 U. S. at 634; and therefore the employee's suit could be maintained against the carrier without prior resort to the Adjustment Board. Among the reasons assigned was that the machinery provided for settling disputes was not "based on a philosophy of legal compulsion" but created "a system for peaceful adjustment and mediation voluntary in its nature."

The problem presented was whether the Adjustment Board procedure either was exclusive or was an essential preliminary to judicial proceedings within the doctrine of primary jurisdiction. These were questions not entirely determinable by the criterion of whether the procedure is wholly advisory or conciliatory in character. For, conceivably, Congress might have made the taking of the Board's merely advisory opinion a condition precedent to asking for judicial relief; and, conversely, allowing that relief without prior resort to the Board does not necessarily make the Board's action, when taken, merely advisory.

[12] Thus, one of the statute's primary commands, judicially enforceable, is found in the repeated declaration of a duty upon all parties to a dispute to negotiate for its settlement. See note 26; Virginian Ry. Co. v. System

320 U. S. 297; *General Committee* v. *M-K-T R. Co.*, 320 U. S. 323; *General Committee* v. *Southern Pacific Co.*, 320 U. S. 338.

I.

The difference between disputes over grievances and disputes concerning the making of collective agreements is traditional in railway labor affairs. It has assumed large importance in the Railway Labor Act of 1934, substantively and procedurally.[13] It divides the jurisdiction and functions of the Adjustment Board from those of the Mediation Board, giving them their distinct characters. It also affects the parts to be played by the collective agent and the represented employees, first in negotiations for settlement in conference and later in the quite different procedures which the Act creates for disposing of the two types of dispute. Cf. §§ 3, 4.

The statute first marks the distinction in Section 2, which states as among the Act's five general purposes: "(4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions." The two sorts of dispute are sharply distinguished,[14] though there are points of common treatment. Nevertheless, it is clear from the Act itself, from the history of railway labor disputes and from the legislative history of the various statutes which have dealt with them,[15] that Congress has drawn major lines of difference between the two classes of controversy.

Federation, 300 U. S. 515; cf. Switchmen's Union v. National Mediation Board, 320 U. S. 297, 300, 320; General Committee v. M-K-T R. Co., 320 U. S. 323, 331, 334. This duty is not merely perfunctory. Good faith exhaustion of the possibility of agreement is required to fulfill it. Cf. Virginian Ry. Co. v. System Federation, *supra*, at 548, 550; Trainmen v. Toledo, P. & W. R. Co., 321 U. S. 50, 56 ff. At successive stages of the statutory procedure other duties are imposed. Cf. §§ 5 First (b), 6, 10.

[13] Cf. the references cited in notes 4 and 15.

[14] Cf. text Part II at note 38; also Hughes Tool Co. v. National Labor Relations Board, 147 F. 2d 69, 72, 73.

[15] See the references cited in note 4; Hearings before Committee on Interstate Commerce on H. R. 7650, 73d Cong., 2d Sess.; Hearings before Committee on Interstate Commerce on S. 3266, 73d Cong., 2d Sess.; Pennsylvania R. Co. v. Railroad Labor Board, 261 U. S. 72; Pennsylvania System Federation v. Pennsylvania R. Co., 267 U. S. 203; Texas & N. O. R. Co. v. Brotherhood, 281 U. S. 548; Virginian Ry. Co. v. System Federation, 300 U. S. 515.

The first relates to disputes over the formation of collective agreements or efforts to secure them. They arise where there is no such agreement or where it is sought to change the terms of one and therefore the issue is not whether an existing agreement controls the controversy. They look to the acquisition of rights for the future, not to assertion of rights claimed to have vested in the past.

The second class, however, contemplates the existence of a collective agreement already concluded or, at any rate, a situation in which no effort is made to bring about a formal change in terms or to create a new one. The dispute relates either to the meaning or proper application of a particular provision with reference to a specific situation or to an omitted case. In the latter event the claim is founded upon some incident of the employment relation, or asserted one, independent of those covered by the collective agreement, e. g., claims on account of personal injuries. In either case the claim is to rights accrued, not merely to have new ones created for the future.

In general the difference is between what are regarded traditionally as the major and the minor disputes of the railway labor world.[16] The former present the large issues about which strikes ordinarily arise with the consequent interruptions of traffic the Act sought to avoid. Because they more often involve those consequences and because they seek to create rather than to enforce contractual rights, they have been left for settlement entirely to the processes of noncompulsory adjustment.

The so-called minor disputes, on the other hand, involving grievances, affect the smaller differences which inevitably appear in the carrying out of major agreements and policies or arise incidentally in the course of an employment. They represent specific maladjustments of a detailed or individual quality. They seldom

[16] Cf. the references cited in note 4. Commissioner (also Coordinator) Eastman, who very largely drafted the 1934 amendments, said in testifying at the House Committee hearings concerning them:

"Please note that disputes concerning changes in rates of pay, rules, or working conditions may not be so referred [to the National Adjustment Board], but are to be handled, when unadjusted, through the process of mediation. The national adjustment board is to handle only the minor cases growing out of grievances or out of the interpretation or application of agreements." Hearings before Committee on Interstate Commerce on H. R. 7650, 73 Cong., 2d Sess., 47; cf. also pp. 49, 51, 59, 62. And see the testimony of Harrison, a principal union proponent, before the House Committee, *id.* at 80-83; and before the Senate Committee, Hearings before Committee on Interstate Commerce on S. 3266, 73d Cong., 2d Sess., 33, 35.

produce strikes, though in exaggerated instances they may do so.[17] Because of their comparatively minor character and the general improbability of their causing interruption of peaceful relations and of traffic, the 1934 Act sets them apart from the major disputes and provides for very different treatment.

Broadly, the statute as amended marks out two distinct routes for settlement of the two classes of dispute, respectively, each consisting of three stages. The Act treats the two types of dispute alike in requiring negotiation as the first step toward settlement and therefore in contemplating voluntary action for both at this stage, in the sense that agreement is sought and cannot be compelled. To induce agreement, however, the duty to negotiate is imposed for both grievances and major disputes.[18]

Beyond the initial stages of negotiation and conference, however, the procedures diverge. "Major disputes" go first to mediation under the auspices of the National Mediation Board; if that fails, then to acceptance or rejection of arbitration, cf. § 7; *Trainmen* v. *Toledo, P. & W. R. Co.*, 321 U. S. 50; and finally to possible presidential intervention to secure adjustment. § 10. For their settlement the statutory scheme retains throughout the traditional voluntary processes of negotiation, mediation, voluntary arbitration, and conciliation. Every facility for bringing about agreement is provided and pressures for mobilizing public opinion are applied. The parties are required to submit to the successive procedures designed to induce agreement. § 5 First (b). But compulsions go only to insure that those procedures are exhausted before resort can be had to self-help. No authority is empowered to decide the dispute and no such power is intended, unless the parties themselves agree to arbitration.

The course prescribed for the settlement of grievances is very different beyond the initial stages. Thereafter the Act does not leave the parties wholly free, at their own will, to agree or not to agree. On the contrary, one of the main purposes of the 1934 amendments was to provide a more effective process of settlement.[19]

[17] Cf. the testimony of Eastman and Harrison, cited in note 16.

[18] Cf. note 12; also notes 26, 27, and text *infra*. The obligation is not partial. In plain terms the duty is laid on carrier and employees alike, together with their representatives; and in equally plain terms it applies to all disputes covered by the Act, whether major or minor.

[19] H. Rep. No. 1944 on H. R. 9861, 73d Cong., 2d Sess., 2; S. Rep. No. 1065 on S. 3266, 73d Cong., 2d Sess., 1, 2.

Prior to 1934 the parties were free at all times to go to court to settle these disputes. Notwithstanding the contrary intent of the 1926 Act, each also had the power, if not the right, to defeat the intended settlement of grievances by declining to join in creating the local boards of adjustment provided for by that Act. They exercised this power to the limit. Deadlock became the common practice, making decision impossible. The result was a complete breakdown in the practical working of the machinery. Grievances accumulated and stagnated until the mass assumed the proportions of a major dispute. Several organizations took strike ballots and thus threatened to interrupt traffic, a factor which among others induced the Coordinator of Transportation to become the principal author and advocate of the amendments. The sponsor in the House insisted that Congress act upon them before adjournment for fear that if no action were taken a railroad crisis might take place.[20] The old Mediation Board was helpless.[21] To break this log jam, and at the same time to get grievances out of the way of the settling of major disputes through the functioning of the Mediation Board, the Adjustment Board was created and given power to decide them.[22]

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[20] Cf. 78 Cong. Rec. 12553. Coordinator Eastman referred, in his testimony, to four recent strike votes occasioned by deadlock. Hearings before Committee on Interstate Commerce, on S. 3266, 73d Cong., 2d Sess., 17.

[21] The Chairman told the Senate Committee: "The provision in the present act [1926] for adjustment boards is in practice about as near a fool provision as anything could possibly be. I mean this—that on the face of it they shall, by agreement, do so and so. Well, you can do pretty nearly anything by agreement, but how can you get them to agree?" Hearings before Committee on Interstate Commerce on S. 3266, 73d Cong., 2d Sess., 137.

[22] See, for a general view of the circumstances inducing enactment of the 1934 Amendments, the references cited above in notes 4, 15, 16, 19. The report of the House Committee in charge of the bill stated:

"Many thousands of these disputes have been considered by boards established under the Railway Labor Act; but the boards have been unable to reach a majority decision, and so the proceedings have been deadlocked. These unadjusted disputes have become so numerous that on several occasions the employees have resorted to the issuance of strike ballots and threatened to interrupt interstate commerce in order to secure an adjustment. This has made it necessary for the President of the United States to intervene and establish an emergency board to investigate the controversies. This condition should be corrected in the interest of industrial peace and of uninterrupted transportation service. This bill, therefore, provides for the establishment of a national board of adjustment to which these disputes may be submitted if they shall not have been adjusted in conference between the parties." H. Rep. No. 1944, 73d Cong., 2d Sess., 3. Cf. also the testimony of Coordinator Eastman, Hearings before Committee on Interstate Commerce on H. R. 7650, 73d Cong., 2d Sess., 49.

The procedure adopted is not one of mediation and conciliation only, like that provided for major disputes under the auspices of the Mediation Board. Another tribunal of very different character is established with "jurisdiction" to determine grievances and make awards concerning them. Each party to the dispute may submit it for decision, whether or not the other is willing, provided he has himself discharged the initial duty of negotiation.[23] § 3 First (i). Rights of notice, hearing, and participation or representation are given. § 3 First (j). In some instances judicial review and enforcement of awards are expressly provided or are contemplated. § 3 First (p); cf. § 3 First (m). When this is not done, the Act purports to make the Board's decisions "final and binding." § 3 First (m).

The procedure is in terms and purpose very different from the preexisting system of local boards. That system was in fact and effect nothing more than one for what respondents call "voluntary arbitration." No dispute could be settled unless submitted by agreement of all parties. When one was submitted, deadlock was common and there was no way of escape. The Adjustment Board was created to remove the settlement of grievances from this stagnating process and bring them within a general and inclusive plan of decision.[24] The aim was not to dispense with agreement. It was to add decision where agreement fails and thus to safeguard the public as well as private interests against the harmful effects of the preexisting scheme.

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[23] Section 3 First (i) expressly conditions the right to move from negotiation into proceedings before the Adjustment Board upon "failing to reach an adjustment in this manner," i. e., by negotiation.

[24] See the testimony of Coordinator Eastman and Mr. Harrison, cited in note 16. The latter stated, at the Senate Committee hearings, pp. 33, 35: "... [T]his has been a question for the last 14 years as to what kind of boards we are going to have to settle our grievances. ... We have always sought national boards; the railroads ... have sought the system boards, regional boards. ... Most of the boards ... under the present law have deadlocked on any number of cases. As a result of that there was fast growing up in our industry a serious condition that might very well develop into substantial interruption of interstate commerce. ... These *railway labor organizations have always opposed compulsory determination of their controversies.* We have lived a long time and got a lot of experience, and we know that these minor cases that develop out of contracts that we make freely, and ... *we are now ready to concede that we can risk having our grievances go to a board and get them determined, and that is a contribution that these organizations are willing to make;* ... if we are going to get a hodgepodge arrangement by law, then we don't want to give up that right, because we only give up the right because we feel that we will get a measure of justice by this machinery that we suggest here." (Emphasis added.)

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II.

The collective agent's power to act in the various stages of the statutory procedures is part of those procedures and necessarily is related to them in function, scope and purpose.

The statute itself vests exclusive authority to negotiate and to conclude agreements concerning major disputes in the duly selected collective agent. Cf. *Virginian Ry. Co.* v. *System Federation, supra.*[25] Since the entire statutory procedure for settling major disputes is aimed only at securing agreement and not decision, unless the parties agree to arbitration, this exclusive authority includes representation of the employees not only in the stage of conference, but also in the later ones of mediation, arbitration and conciliation.

Whether or not the agent's exclusive power extends also to the settlement of grievances, in conference or in proceedings before the Board, presents more difficult questions. The statute does not expressly so declare. Nor does it explicitly exclude these functions. The questions therefore are to be determined by implication from the pertinent provisions. These are the ones relating to rights of participation in negotiations for settlement and in proceedings before the Board. They are in part identical with the provisions relating to major disputes, but not entirely so; and the differences are highly material.

The questions of power to bargain concerning grievances, that is, to conclude agreements for their settlement, and to represent aggrieved employees in proceedings before the Board are not identical. But they obviously are closely related in the statutory scheme and in fact. If the collective agent has exclusive power to settle grievances by agreement, a strong inference, though not necessarily conclusive, would follow for its exclusive power to represent the aggrieved employee before the Board. The converse also would be true. Accordingly it will be convenient to consider the two questions together.

The primary provisions affecting the duty to treat are found in Section 2 First and Second, imposing the duty generally as to all disputes, both major and minor, and Sections 2 Sixth and 3 First (i), together with the proviso to Section 2 Fourth, which apply specially to grievances. These sections in material part

[25] Cf. also Medo Photo Supply Corp. v. National Labor Relations Board, 321 U. S. 678; J. I. Case Co. v. National Labor Relations Board, 321 U. S. 332.

are set forth in the margin,[26] except the proviso which is as follows: "Provided, That nothing in this Act shall be construed to prohibit a carrier from permitting *an employee, individually,* or local representatives of employees *from conferring* with management during working hours *without loss of time,* or to prohibit a carrier from furnishing free transportation to its employees while engaged in the business of a labor organization."[27] (Emphasis added.)

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[26] By Section 2 First, "*It shall be the duty of all* carriers, their officers, agents, and *employees* to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and *to settle all disputes,* whether arising out of *the application* of such agreements or otherwise, in order to avoid any interruption to commerce. . . ." By Section 2 Second, "*All* disputes between a carrier or carriers and its or their employees *shall be considered, and, if possible, decided,* with all expedition, in conference *between representatives designated and authorized* so to confer, respectively, by the carrier or carriers and *by the employees thereof interested in the dispute.*" (Emphasis added.) These are the basic sections creating the duty, applicable to all disputes, major or minor, and to carriers and employees alike.

Other provisions affecting the general duty to treat are those of Section 2 Third, that "representatives, *for the purposes of this Act,* shall be designated by the respective parties without interference" by the other and "need not be persons in the employ of the carrier"; of Section 2 Fourth, that "the majority of any craft or class of employees shall have the right to determine who shall be *the representative of the craft or class for the purposes of this Act*"; and of Section 2 Eighth that "every carrier shall notify its employees by printed notices . . . that *all disputes* between the carrier and its employees *will be handled in accordance with the requirements of this Act.*" (Emphasis added.)

Section 2 Sixth applies specially to grievances, as does Section 3 First (i). The former provides: "In case of a dispute between a carrier or carriers and its or their employees, *arising out of grievances or out of the interpretation or application of agreements* concerning rates of pay, rules, or working conditions, *it shall be the duty of the designated representative* or representatives of such carrier or carriers and *of such employees,* within ten days after the receipt of notice of a desire on the part of either party *to confer* in respect to such dispute, to specify a time and place. . . ." Section 3 First (i) is as follows: "The disputes between *an employee* or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act, *shall be handled in the usual manner up to and including* the chief operating officer of the carrier designated to handle such disputes; but, *failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board* with a full statement of the facts and all supporting data bearing upon the disputes." (Emphasis added.)

[27] Section 2 Eighth makes this proviso part of the contract of employment between the carrier and each employee, and Section 2 Tenth makes it a misdemeanor for the carrier to refuse to observe it. Section 2 Eighth incorporates the provisions of Sections 2 Third, Fourth and Fifth in each employee's contract of employment. Section 2 Tenth makes it a misdemeanor for the carrier to fail or refuse to comply with the terms of Sections 2 Third, Fourth, Fifth, Seventh and Eighth.

Relating to participation in the Board's proceedings, in addition to the concluding sentence of Section 3 First (i), see note 26, is Section 3 First (j), as follows: "Parties may be heard either *in person*, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings *to the employee* or employees and the carrier or carriers involved in any dispute submitted to them." (Emphasis added)

Petitioner urges that, notwithstanding the proviso and Section 3 First (j), the effect of the provisions taken as a whole is to make the collective agent the employees' exclusive representative for the settlement of *all* disputes, both major and minor, and of the latter "whether arising out of the application of such [collective] agreements or otherwise." The argument rests primarily upon Sections 2 First, Second, Third, Fourth, Sixth, and 3 First (i). It emphasizes the carrier's duty to treat with the collective representative, as reinforced by Sections 2 Eighth and Tenth.[28]

Petitioner does not squarely deny that the aggrieved employee may confer with the carrier's local officials either personally or through *local* union representatives in accordance with the proviso to Section 2 Fourth. But this right, if it exists, is regarded apparently as at most one to be heard, since in petitioner's view the power to make settlement by agreement is vested exclusively in the collective agent. Cf. §§ 2 Sixth and 3 First (i).

The collective agent, as the carrier conceives the statute, is the "representative[s], designated and authorized to confer" within the meaning of Section 2 Second, without distinction between major and minor disputes. It is likewise the "representative, for the purposes of this Act," again without distinction between the two types of dispute, in the selection of which by "the respective parties" Section 2 Third forbids the other to interfere. It is also "the designated representative" of the employees with whom, by Section 2 Sixth, the carrier is required to treat concerning grievances in conference, a provision considered to carry over into Section 3 First (i). The latter requires that disputes over grievances "shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes."

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[28] See note 27.

In accordance with this view "either party," within the further provision of Section 3 First (i) authorizing reference of the dispute to the Adjustment Board "by petition of the parties or by either party," refers to the carrier or the collective agent, not to the aggrieved employee acting otherwise than by the collective agent. Hence, "parties" as used in Section 2 First (j) is given similar meaning. Consequently the collective agent also has exclusive power to submit the dispute to the Board and to represent aggrieved employees before it.

Petitioner's view has been adopted, apparently, in the general practice, if not the formally declared, policy of the Adjustment Board. And this, it seems, has been due to the position taken consistently by the employees' representatives on the Board, over the opposition of carrier representatives.[29] The unions, apparently, like petitioner in this case, interpret the Act as not contemplating two distinct systems for the settlement of disputes, one wholly collective for major disputes, the other wholly individual for minor ones. In this view the collective agent becomes a party to the collective agreement by making it and its interest as representative of the collective interest does not cease when that function ends. It remains a party to the agreement, as such representative, after it is made; and consequently, in that capacity and for the protection of the collective interest, is concerned with the manner in which the agreement may be interpreted and applied.

Accordingly, petitioner urges that the statute, both by its terms and by its purpose, confers upon the collective agent the same exclusive power to deal with grievances, whether by negotiation and contract, or by presentation to the Board when agreement fails, as is given with respect to major disputes. And the aggrieved employee's rights of individual action are limited to rights of hearing before the union and possibly also by the carrier.

We think that such a view of the statute's effects, in so far as it would deprive the aggrieved employee of effective voice in any settlement and of individual hearing before the Board, would be contrary to the clear import of its provisions and to its policy.

[29] Cf. Administrative Procedure in Government Agencies, Sen. Doc. 10, Part IV, 77th Cong., 1st Sess., 7.

It would be difficult to believe that Congress intended, by the 1934 amendments, to submerge wholly the individual and minority interests, with all power to act concerning them, in the collective interest and agency, not only in forming the contracts which govern their employment relation,[30] but also in giving effect to them and to all other incidents of that relation. Acceptance of such a view would require the clearest expression of purpose. For this would mean that Congress had nullified all preexisting rights of workers to act in relation to their employment, including perhaps even the fundamental right to consult with one's employer, except as the collective agent might permit. Apart from questions of validity, the conclusion that Congress intended such consequences could be accepted only if it were clear that no other construction would achieve the statutory aims.[31]

The Act's provisions do not require such a construction. On the contrary they appear expressly to preclude it. The proviso to Section 2 Fourth in terms reserves the right of "an employee *individually*" to confer with management; and Section 3 First (j) not only requires the Board to give "due notice of all hearings *to the employee* . . . involved in any dispute submitted . . . ," but provides for "parties" to be heard "either *in person*, by counsel, or by other representatives, as they may respectively elect."

These provisions would be inapposite if the collective agent, normally a labor union and an unincorporated association, exclusively were contemplated. Such organizations do not and cannot appear and be heard "in person." Nor would the provision for notice "to *the employee* . . . involved in any dispute" be either appropriate or necessary. If only the collective representative were given rights of submission, notice, appearance

[30] Cf. Steele v. Louisville & N. R. Co., 323 U. S. 192; Tunstall v. Brotherhood of Locomotive Firemen & Enginemen, 323 U. S. 210; Wallace Corp. v. National Labor Relations Board, 323 U. S. 248.

[31] In this connection it is important to recall that the Act does not contemplate the existence of closed shops, to the extent at any rate that the carrier is forbidden to make such agreements. Cf. § 2 Fourth; 78 Cong. Rec. 12,602; 40 Op. Atty. Gen., No. 59 (Dec. 29, 1942). Accordingly the interests of unorganized workers and members of minority unions are concerned in the solution. These are not always adverse to the interests of the majority or of the designated union. But they may be so or even hostile. Cf. the authorities cited in note 30. To regard the statute as so completely depriving persons thus situated of voice in affairs affecting their very means of livelihood would raise very serious questions.

and representation, language more aptly designed so to limit those rights was readily available and was essential for the purpose.

This conclusion accords fully with the terms of the proviso to Section 2 Fourth. It appears to be intended as a qualification, in respect to loss of time and free transportation, of the section's preceding prohibitions against the carrier's giving financial and other aid to labor organizations and to employees in an effort to influence their union affiliations.[32] However, the language clearly contemplates also that the individual employee's right to confer with the management about his own grievance is preserved. There is some indication in the legislative history to this effect.[33] The right is so fundamental that we do not believe the purpose was to destroy it. Cf. 40 Op. Atty. Gen., No. 59, pp. 5, 6 (Dec. 29, 1942); *Hughes Tool Co.* v. *National Labor Relations Board*, 147 F. 2d 69.

Rights of conference are not identical with rights of settlement. But the purpose of conference and the duty to treat is to bring about agreement. The right and the obligation to share in the negotiations are relevant to their aim. Conceivably the statute might confer the right to participate in the negotiations, that is, to be heard before any agreement is concluded, either upon the collective agent or upon the aggrieved employee or employees, at the same time conferring upon the other the final voice in determining the terms of the settlement. This is, in effect, the position taken by each of the parties in this case. But they differ concerning where the final say has been vested. Petitioner maintains it has been given to the union. Respondents say it has been left with them.

In the view we take the Act guarantees to the aggrieved employee more than merely the right to be heard by the union and the carrier. We cannot say that the terms of the proviso to Section 2 Fourth and of Section 3 First (j) are so limited. Moreover, Section 3 First (p) expressly states that the statutory

[32] This undoubtedly was the primary object. The language in the concluding clause, "while engaged in the business of a labor organization," applies literally only to employees traveling upon union business, and has no apparent application to the preceding provision relating to the individual employee's right to confer with management.

[33] Hearings before Committee on Interstate Commerce on H. R. 7650, 73d Cong., 2d Sess., 36, 44, 89.

suit to enforce an award in favor of an aggrieved employee may be brought by "the petitioner," presumably the collective agent, or by the employee. All of these provisions contemplate effective participation in the statutory procedures by the aggrieved employee.

His rights, to share in the negotiations, to be heard before the Board, to have notice, and to bring the enforcement suit, would become rights more of shadow than of substance if the union, by coming to agreement with the carrier, could foreclose his claim altogether at the threshold of the statutory procedure. This would be true in any case where the employee's ideas of appropriate settlement might differ from the union's. But the drastic effects in curtailment of his preexisting rights to act in such matters for his own protection would be most obvious in two types of cases: one, where the grievance arises from incidents of the employment not covered by a collective agreement, in which presumably the collective interest would be affected only remotely, if at all; the other, where the interest of an employee not a member of the union and the collective interest, or that of the union itself, are opposed or hostile. That the statute does not purport to discriminate between these and other cases furnishes strong support for believing its purpose was not to vest final and exclusive power of settlement in the collective agent.[34]

We need not determine in this case whether Congress intended to leave the settlement of grievances altogether to the individual workers, excluding the collective agent entirely except as they may specifically authorize it to act for them, or intended it also to have voice in the settlement as representative of the collective interest. Cf. *Matter of Hughes Tool Company*, 56 N. L. R. B. 981, modified and enforced, *Hughes Tool Co.* v. *National Labor Relations Board*, *supra*. The statute does not expressly exclude grievances from the collective agent's duty to treat or power to submit to the Board. Both collective and individual interests may be concerned in the settlement where, as in this case, the dispute concerns all members alike, and settlement hangs exclusively upon a single common issue or cause of dispute arising from the terms

[34] Cf. note 37 and text. It is to be doubted that Congress by the generally inclusive language used concerning grievances intended, for instance, to give the collective agent exclusive power to settle a grievance arising independently of the collective agreement, affecting only nonunion men to whose claim the union and the majority were hostile.

of a collective agreement.[35] Those interests combine in almost infinite variety of relative importance in relation to particular grievances, from situations in which the two are hostile or in which they bear little or no relation of substance to each other and opposed to others in which they are identified.[36]

Congress made no effort to deal specifically with these variations.[37] But whether or not the collective agent has rights, independently of the aggrieved employee's authorization, to act as representative of the collective interest and for its protection in any settlement, whether by agreement or in proceedings before the Board, an award cannot be effective as against the aggrieved employee unless he is represented individually in the proceedings in accordance with the rights of notice and appearance or representation given to him by Section 3 First (j). Those rights are separate and distinct from any the collective agent may have to represent the collective interest. For an award to affect the employee's rights, therefore, more must be shown than that the collective agent appeared and purported to act for him. It must appear

[35] But whether or not the carrier's violation affects all the members of the group immediately and alike, so as to create a present basis for claims by each, the violation, though resulting from misinterpretation, would constitute a present threat to the similar rights of all covered by the contract. Cf. Hughes Tool Co. *v.* National Labor Relations Board, *supra*, 72, 74; 40 Op. Atty. Gen., No. 59, pp. 4, 5, (Dec. 29, 1942).

To leave settlements in such cases ultimately to the several choices of the members, each according to his own desire without regard to the effect upon the collective interest, would mean that each affected worker would have the right to choose his own terms and to determine the meaning and effect of the collective agreement for himself. Necessarily, the carrier would be free to join with him in doing so and thus to bargain with each employee for whatever terms its economic power, pitted against his own, might induce him to accept. The result necessarily would be to make the agreement effective, not to all alike, but according to whatever varied interpretations individual workers, from equally varied motivations, might be willing to accept. To give the collective agent power to make the agreement, but exclude it from any voice whatever in its interpretation would go far toward destroying its uniform application.

[36] Depending upon the substantive character of the claim, its foundation in a collective agreement or otherwise, its intrinsically substantial or insubstantial nature, the number of employees affected, the length of time it remains unsettled, the number of claims allowed so to run, or perhaps other factors, the grievance may be a matter of large moment to the group as a whole or of little or no concern to it and, it may be, of either identical or converse importance to the individual or individuals directly affected.

[37] Congress was concerned primarily with differences between the carrier and the employees, not with differences among the latter or between them or some of them, and the collective agent. The statute therefore was not drawn with an eye levelled to these problems, except as to choice of representatives, cf. § 2 Fourth; § 2 Ninth; and note 34.

that in some legally sufficient way he authorized it to act in his behalf.[38]

Petitioner's contrary view, as has been indicated, regards the settlement of grievances as part of the collective bargaining power, indistinguishable from the making of collective agreements. The assumption ignores the major difference which the Act has drawn between those functions, both in defining them and in the modes provided for settlement.

To settle for the future alone, without reference to or effect upon the past, is in fact to bargain collectively, that is, to make a collective agreement. That authority is conferred independently of the power to deal with grievances, as part of the power to contract "concerning rates of pay, rules, or working conditions." It includes the power to make a new agreement settling for the future a dispute concerning the coverage or meaning of a pre-existing collective agreement. For the collective bargaining power is not exhausted by being once exercised; it covers changing the terms of an existing agreement as well as making one in the first place.

But it does not cover changing them with retroactive effects upon accrued rights or claims. For it is precisely the difference between making settlements effective only for the future and making them effective retroactively to conclude rights claimed as having already accrued which marks the statutory boundary between collective bargaining and the settlement of grievances. The latter by explicit definition includes the "interpretation or application" of existing agreements. To regard this as part of the collective bargaining power identifies it with making new agreements having only prospective operation; and by so doing obliterates the statute's basic distinction between those functions.[39]

[38] Authority might be conferred in whatever ways would be sufficient according to generally accepted or "common law" rules for the creation of an agency, as conceivably by specific authorization given orally or in writing to settle each grievance, by general authority given to settle such grievances as might arise, or by assenting to such authority by becoming a member of a union and thereby accepting a provision in its constitution or rules authorizing it to make such settlements.

[39] The distinction holds true although "interpretation or application" may look to the future as well as the past, as it often does. It goes to the source of the right asserted, whether in an antecedent agreement or only to one presently sought. The difference is important for other issues as well as those presently involved, e. g., application of statutes of limitations.

The distinction is not to be ignored or wiped out merely because a particular dispute or agreement may look both to the past and to the future. The special procedure for settling grievances was created because it was intended they should be disposed of differently from disputes over "rates

The Brotherhood had power, therefore, as collective agent to make an agreement with the carrier, effective for the future only, to settle the question of starting time, and that power was derived from the Act itself. In dealing within its scope, the carrier was not required to look further than the Act's provisions to ascertain the union's authority. But it does not follow, as petitioner assumes, that it had the same right to deal with the union concerning the past. That aspect of the dispute was not part of the collective agent's exclusive statutory authority.

If to exclude it severs what otherwise might be considered organic, the severance clearly is one which Congress could make and is one we think it has made, by its definition of grievances and by the provisions for individual participation in their settlement. If, moreover, as petitioner urges, this may make the settlement less convenient than if power to deal with grievances were vested exclusively in the collective agent, that consequence may be admitted. But it cannot outweigh the considerations of equal or greater force which we think Congress has taken into account in preserving the individual workman's right to have a voice amounting to more than mere protest in the settlement of claims arising out of his employment.

From the fact that the Brotherhood occupied the position of collective bargaining agent and as such had power to deal for the future, therefore, petitioner was not entitled to make any assumption concerning its authority to settle the claims accrued for the past or to represent the claimants exclusively in proceedings before the Board. Accordingly for the union to act in their behalf with conclusive effect, authorization by them over and above any authority given by the statute was essential.

III.

Petitioner urges that, apart from the statute, the facts of record show as a matter of law that respondents authorized the Brotherhood to settle the claims, to submit them to the Board, and

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of pay, rules, or working conditions,'' which were committed exclusively to the collective agent's authority. One important difference preserved the aggrieved employee's rights to participate in all stages of the settlement. Congress therefore, when it preserved those rights, contemplated something more than collective representation and action to make the settlement effective for the past. It follows that the individual employee's rights cannot be nullified merely by agreement between the carrier and the union. They are statutory rights, which he may exercise independently or authorize the union to exercise in his behalf.

to represent them in its proceedings. Respondents deny that authority in any of these respects was given, either by individual authorization or by virtue of the Brotherhood's constitution and rules; and they insist that the record presents these questions as issues of fact.

Stripped of its statutory influences, petitioner's argument comes in substance to this. It is undisputed that from August 27, 1934, to November 23, 1936, when the complaint in Docket No. 3537 was filed, respondents made out time slips and filed many complaints with the carrier's local officials through local officers of the Brotherhood on account of departures from the schedule of Article 6. The question of the Article's applicability was a matter of discussion between the Brotherhood and company officials from the time of the transfer in 1934. Respondents admit having authorized the Brotherhood, at a meeting of their local lodge, to file the complaint in Docket No. 3537 and that this complaint was filed in full compliance with the Brotherhood's constitution and rules. The settlement of October, 1938, and the consequent withdrawal of the claim in Docket No. 3537 were made by the same official, Williams, whom respondents had authorized to file the claim and with whom, in effect, both the collective agreement and the Brotherhood's regulations required petitioner to deal concerning the matter.[40] Moreover, the complaint in Docket No. 7324, filed in May, 1939, was filed by Williams and in the same manner as the complaint in Docket No. 3537.

From these facts petitioner concludes that respondents authorized the Brotherhood to settle the claims and to represent them before the Board. In its view, all of these transactions related to the

[40] The collective agreement, of which Article 6 is a part, provides: "Any controversy arising *as to the application* of the rules, herein agreed upon . . . . shall be taken up . . . . " by the general grievance committee with the general superintendent of the carrier, "and in the event of their failure to agree upon a satisfactory settlement, the Committee may appeal to the Vice President." (Emphasis added.) Petitioner says this provision bound it to deal only with the general committee.

Petitioner also relies upon Rule 10 of the Brotherhood's constitution and general rules as imposing the same duty:

"Whatever action may be taken by the General Grievance Committee or Board of Adjustment of any system within the meaning of the above General Rules shall be law to the Lodges on that road until and unless reversed by the Board of Appeals, and if any member refuses to vote or abide by the action of such General Grievance Committee or Board of Adjustment, he shall be expelled from the Brotherhood for violation of obligation."

See also note 8.

same subject matter, namely, whether Article 6 was applicable in the Whiting yard, the only difference being that the relief sought in the two proceedings was not the same; and that difference is not material.

Respondents differ concerning the effect of these facts and others they set forth. They allege that under the Brotherhood's constitution and rules neither Williams and Johnson nor the general grievance committee could "revise or change a general wage 'schedule' or agreement concerning rates of pay, nor working conditions, unless authorized to do so by a majority vote of the lodges, or by a majority vote of the membership in the system"; that claims of individual members for back compensation could not be released without specific authority given individually; that no such authority was given; and that the carrier had knowledge of these limitations. They further allege that Williams and Johnson failed to notify them of the settlement, as the by-laws required;[41] and deny that they knew of the settlement, the proceedings in Docket 7324 or the award until after the award was made, when they promptly repudiated it.[42] They say accordingly that Williams acted without authority from them directly or through the Brotherhood's regulations in submitting and presenting the claims; and that the award is invalid not only for this reason but also because no notice of the proceeding was given to them.

It is apparent that the parties are at odds upon the inferences to be drawn from the facts and their legal effects rather than upon the facts themselves. Respondents deny, and petitioner apparently does not claim, that they at any time individually and specifically authorized the Brotherhood or its officials to compromise their claims for money due or to act for them exclusively in Board proceedings concerning those claims. If there is an issue in this respect it is obviously one of fact concerning which evidence and findings would be required.

The real issues, as we view the record, come down to whether respondents assented, in legal effect, to the final settlement of their

[41] This, they say, was because Williams did not regard the agreement as waiving the money claims, since he did not give them the required notice and shortly after the settlement filed the money claims with the Board. Cf. note 6.

[42] Respondents also attack the settlement because it was not signed by the third member of the grievance committee, the local grievance chairman. This objection borders on the frivolous.

claims by the union or to exclusive representation by it in any of the following ways: (1) by making complaints through local union officials; (2) by authorizing the Brotherhood to submit the complaint in Docket No. 3537; (3) by virtue of the Brotherhood's regulations; (4) by virtue of the collective agreement.

The collective agreement could not be effective to deprive the employees of their individual rights. Otherwise those rights would be brought within the collective bargaining power by a mere exercise of that power, contrary to the purport and effect of the Act as excepting them from its scope and reserving them to the individuals aggrieved. In view of that reservation the Act clearly does not contemplate that the rights saved may be nullified merely by agreement between the carrier and the union.

Nor can we say as a matter of law that the mere making of complaints through local Brotherhood officials amounted to final authorization to the union to settle the claims or represent the employees before the Board. Neither the statute nor the union's regulations purported to give these effects to that conduct. The time slips apparently were filed by the employees themselves. The record shows only the general fact that complaints concerning departures were made through local officials. More than this would be required to disclose unequivocal intention to surrender the individual's right to participate in the settlement and to give the union final voice in making it together with exclusive power to represent him before the Board. The making of complaints in this manner was only preliminary to negotiation and equivocal at the most.

Nor can we say, in the present state of the record, that the union's regulations unequivocally authorized the general grievance committee or its chairman either to settle the claims or to act as exclusive representative before the Board. The parties rely upon apparently conflicting provisions, or, if they are not actually in conflict, then upon different ones, the applicability of some of which is in dispute. Thus respondents rely upon Rule 3, which forbids change in existing agreements without the required vote of local lodges or system membership, and petitioner says the rule is not applicable to the dispute in this case. Whether or not the rule is applicable is a question of fact to be determined in the light of whatever evidence may be presented to sustain the one view or the other. Conceivably it may be intended to apply

only where no grievance is involved or to the settlement of grievances and other disputes as well. But we cannot say, in the absence of further light than is now available, that on its face the rule bears only the one construction or the other.

Similar difficulties arise in connection with the other regulations. Only some of them are set forth in the printed record, although the full constitution and rules were made a part of the record proper by petitioner. The rules and regulations do not purport to require members to negotiate and settle their grievances only through the union. The general committee can act only when a grievance is referred to it by a local lodge. The rules are extensive, parts of them appear to involve possible conflict, the parties differ concerning their effects, and the mode of their operation quite obviously may be largely affected by the manner in which they are applied in practice. Their construction and legal effect are matters of some complexity and should not be undertaken in a vacuum apart from the facts relating to their application in practice. Because both factual and legal inferences would be involved in determining the effects of the regulations to bring about a surrender of the individual rights to take part in the settlement and in the Board's proceedings, those effects cannot be determined as a matter of law in the first instance here.

Nor can we say as a matter of law that authorizing the submission in Docket No. 3537, without more, constituted authorization either to make the agreement of settlement or to represent the employees in Docket No. 7324. The matter requires some explication in the light of the view we have taken concerning the rights of an aggrieved employee in the settlement of grievances. In that view no valid settlement can be made unless he agrees. If settlement by agreement after negotiation fails, he has the right to submit the dispute to the Board for decision. If it is submitted he has rights of notice, hearing and individual representation according to his choice.

All these rights are separate and distinct, though closely related. A surrender or delegation of one would not result in surrender of the others as a matter of law or necessarily as a matter of fact. Whether in particular circumstances it might do so would depend upon whether they were considered sufficient to disclose such an intent.[43] It follows that authority to concur in an agree-

[43] In other words, the aggrieved employee has the right to delegate his power to concur in an agreement of settlement, but at the same time to

ment of settlement does not imply without more, authority to represent the employee in Board proceedings, or the latter the former. This is true when the authority is given to the collective agent as it is when it is given to another. That circumstance is not controlling. It only bears as one factor in the total situation. Accordingly in this case the mere fact that the respondents authorized the union to make the submission and to represent them in Docket No. 3537 did not imply authority to make the settlement agreement or to represent them in the quite different later proceedings in Docket No. 7324.

The record does not show conclusively that prior to the submission in Docket No. 3537 the employees had finally committed the whole matter of their claims into the union's hands in such a manner as to constitute a surrender of their individual rights to concur in any agreement of settlement. That conclusion is not justified merely from the fact that the union participated in negotiations with the carrier.

Moreover, the authorization to act in Docket No. 3537, obviously was given after efforts to secure settlement by negotiation and agreement were considered to have failed. Only then was anyone entitled to make the submission. Accordingly that authorization was entirely consistent with the idea that no further negotiations would be had, and therefore, without more, also with the idea that no authority to negotiate further was implied. It may be that upon a full hearing concerning the course and scope of the negotiations prior to this submission, the evidence will justify a conclusion that the respondents had authorized the union to act finally for them. But the record in its present state does not justify that conclusion as a matter of law.[44]

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reserve his rights to make submission to the Board and of appearance and representation before it, or conversely to reserve his right to concur and delegate the rights of submission and representation. To what extent he may delegate one or all depends therefore upon the intent with which he makes the particular delegation as disclosed by the circumstances in which it is made, or gives evidence of such intent by his conduct, and this will be a question of fact unless the circumstances so clearly show he intended to make the delegation claimed that no other conclusion is possible.

[44] It is true that respondents' position concerning the consequences of their authorization to make the submission in Docket No. 3537 is not altogether consistent. For in claiming that they authorized submission only to determine the applicability of Article 6 for the future, and not to determine the question of retroactivity so as to establish or conclude adversely the basis for their individual monetary claims, they appear to ignore, as does petitioner in some of its contentions, the distinction between collective bargaining

It may be true also that if Docket No. 3537 had been carried to decision the award would have been effective to determine the rights of the parties. But no award was made in that proceeding. It was terminated and the claim was withdrawn. Whether or not that action or other events occurring later were effective to terminate the authority given to submit for the Board's determination the issue which was the foundation of respondents' monetary claims or whether that authority continued in spite of the changed conditions are questions also to be determined from a factual evaluation of the entire situation, essentially preliminary to determination of legal effects, which we cannot make.

Since upon the total situation we cannot say as a matter of law that respondents had authorized the Brotherhood to act for them in Docket No. 7324, whether in submitting the cause or in representing them before the Board; since it is conceded also that they were not given notice of the proceedings otherwise than as the union had knowledge of them; and since further they have denied that they had knowledge of the proceedings and of the award until after it was entered, the question whether the award was effective in any manner to affect their rights must be determined in the further proceedings which are required. The crucial issue in this respect, of course, will be initially whether respondents had authorized the Brotherhood in any legally sufficient manner to represent them, individually, in the Board's proceedings in Docket No. 7324.

Until that question is determined, it is not necessary for us to pass upon the important issue concerning the finality and conclusive effect of the award, or to determine the validity and legal effect of the compromise agreement. We accordingly express no opinion concerning those issues.

The judgment is affirmed. The cause is remanded for further proceedings in conformity with this opinion.

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and the settlement of grievances as the Act defines them. Cf. note 39 and text. If their purpose was merely to authorize settlement for the future, without retroactive effects, the submission to the Adjustment Board was misconceived, since it has no power to render a decision requiring the carrier or the union to make a new agreement. Its only authority, under the Act, is to determine what they have agreed upon previously or, outside the scope of a collective agreement, what rights the carrier and its employees may have acquired by virtue of other incidents of the employment relation. Such an issue by its very nature looks to the past, though it may also seek compliance for the future.

SUPREME COURT OF THE UNITED STATES.

No. 160.—October Term, 1944.

Elgin, Joliet and Eastern Railway Company, Petitioner, *vs.* G. W. Burley, et al.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

[June 11, 1945.]

Mr. Justice Frankfurter, dissenting.

On July 27, 1934, the Brotherhood of Railroad Trainmen made an agreement with petitioner, Elgin, Joliet and Eastern Railway Company, affecting its yardmen whereby the starting time for switching crews was fixed. The respondents are employed as switching crews in the Whiting, Indiana yard of petitioner. They are all members of the Brotherhood. Observance by petitioner of this yard agreement was called into question. After abortive conferences for the adjustment of these claims between officials of petitioner and of the Brotherhood, C. H. Williams, General Chairman of the Brotherhood General Grievance Committee, filed a complaint covering several grievances with the National Railroad Adjustment Board, created by the Railway Labor Act of 1934, 48 Stat. 1185, 45 U. S. C. § 151 *et seq.*, to compel petitioner's compliance with the agreed time. In November, 1936, the cases were duly docketed. Before they came to be heard, petitioner, on October 28, 1938, proposed settlement of numerous claims against it by the Brotherhood then pending before the Adjustment Board. Among these claims was the dispute as to starting time. Petitioner agreed for a ninety-day trial period, beginning November 15, 1938, to abide by the time fixed in the 1934 agreement. But its offer was conditioned "on a complete settlement and withdrawal of all cases now pending either before the board, or under discussion with this office . . . and it is further understood that in the event these settlements are accepted that the claims listed in this letter cover all claims of a similar nature, and that no other claims covering the same or like situations will be presented when such claims arise from causes occurring prior to the date of this settlement." On October 31, 1938, settlement

on these terms was accepted for the yardmen by Williams, General Chairman, and S. F. Johnson, the Secretary of the Brotherhood's General Grievance Committee. On the same day and upon request of the Brotherhood and Railway, the cases were removed from its docket by the Adjustment Board.

Later the Brotherhood filed with the Adjustment Board a second complaint claiming money damages on behalf of its members for violation of the 1934 agreement. The Board, by formal award, denied the claim on the ground that the "evidence shows that the parties to the agreement disposed of the claim here made by the letter of carrier dated October 28th, 1938, accepted by employees October 31, 1938."

Respondents then filed this suit in the District Court for damages. Petitioner invoked the 1938 settlement and the Board's award thereon as a bar, and moved for summary judgment. Respondents resisted this motion by denying the authority of the Brotherhood officials to present their claims to the Board or to agree to the settlement. The District Court gave summary judgment for the petitioner which was reversed by the Circuit Court of Appeals for the Seventh Circuit on the ground that the question of authority of the Brotherhood officials raised an issue of fact for trial by the District Court. 140 F. 2d 488. The correctness of this ruling is the important question now before us. 323 U. S. 690.

We have had recent occasion to consider the Railway Labor Act in other aspects. *Switchmen's Union* v. *Board*, 320 U. S. 297; *General Committee* v. *M.-K.-T. R. Co.*, 320 U. S. 323; *General Committee* v. *Sou. Pac. Co.*, 320 U. S. 338. The complexities which the problems in those cases laid bare, make clear that the specific question immediately before us cannot be isolated from the scheme and structure of the Railway Labor Act as an entirety. The Act in turn cannot be appreciated apart from the environment out of which it came and the purposes which it was designed to serve.

From the point of view of industrial relations our railroads are largely a thing apart. The nature and history of the industry, the experience with unionization of the roads, the concentration of authority on both sides of the industry in negotiating collective agreements, the intimacy of relationship between the leaders of the two parties shaped by a long course of national, or at least regional, negotiations, the intricate technical aspects of these agree-

ments and the specialized knowledge for which their interpretation and application call, the practical interdependence of seemingly separate collective agreements—these and similar considerations admonish against mutilating the comprehensive and complicated system governing railroad industrial relations by episodic utilization of inapposite judicial remedies.

The Railway Labor Act of 1934 is primarily an instrument of government. As such, the view that is held of the particular world for which the Act was designed will largely guide the direction of judicial interpretation of the Act. The railroad world for which the Railway Labor Act was designed has thus been summarized by one of the most discerning students of railroad labor relations: "The railroad world is like a state within a state. Its population of some three million, if we include the families of workers, has its own customs and its own vocabulary, and lives according to rules of its own making. . . . This state within a state has enjoyed a high degree of internal peace for two generations; despite the divergent interests of its component parts, the reign of law has been firmly established." Garrison, The Railroad Adjustment Board: A Unique Administrative Agency (1937) 46 Yale L. J. 567, 568-69.

The Railway Labor Act of 1934 is an expression of that "reign of law" and provides the means for maintaining it. Nearly half a century of experimental legislation lies behind the Act. It is fair to say that every stage in the evolution of this railroad labor code was progressively infused with the purpose of securing self-adjustment between the effectively organized railroads and the equally effective railroad unions and, to that end, of establishing facilities for such self-adjustment by the railroad community of its own industrial controversies. These were certainly not expected to be solved by ill-adapted judicial interferences, escape from which was indeed one of the driving motives in establishing specialized machinery of mediation and arbitration. Government intervention of any kind was contemplated only as a last resort for the avoidance of calamitous strikes.

The landmarks in this history, tersely summarized, are the meager act of October 1, 1888, 25 Stat. 501, providing for voluntary arbitration; the Erdman Act of June 1, 1898, 30 Stat. 424, securing government mediation and arbitration, but applicable only to those actually engaged in train service operations; the New

lands Act of July 15, 1913, 38 Stat. 103, providing for a permanent board of mediation and also a board of arbitration; the Adamson Act of September 3, 1916, 39 Stat. 721, as to which see *Wilson* v. *New*, 243 U. S. 332; Order No. 8 of February 21, 1918, formulating the labor policy of the Government after the United States took over the railroads, see Hines, War History of American Railroads (1928) p. 155 *et seq.*; the more elaborate machinery established by Title III of the Transportation Act of 1920, 41 Stat. 456, 469, for adjustments of these controversies, which in its turn was repealed and replaced by the Railway Labor Act of May 20, 1926, 44 Stat. 577, legislation agreed upon between the railroads and the Brotherhoods and probably unique in having been frankly accepted as such by the President and Congress.[1] The actual operation of this legislation partly disappointed the hopes of its sponsors, and led, for the still greater promotion of self-government by the railroad industry, to the Act of 1934.

The assumption as well as the aim of that Act is a process of permanent conference and negotiation between the carriers on the one hand and the employees through their unions on the other. Section 2, First, provides "It shall be the duty of all carriers . . . and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise . . ." Section 2, Second, provides "All disputes between a carrier . . . and its . . . employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier . . . and by the employees thereof interested in the dispute." According to § 2, Sixth, "In case of a dispute . . . arising out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, it shall be the duty of the designated representative or representatives of such carrier . . . and of such employees, within ten days after the receipt of notice of a desire on the part of either party to confer in respect to such dispute, to specify a time and place at which such conference shall

[1] In his message of December 8, 1925, to Congress, President Coolidge stated: "I am informed that the railroad managers and their employees have reached a substantial agreement as to what legislation is necessary to regulate and improve their relationship. Whenever they bring forward such proposals, which seem sufficient also to protect the interests of the public, they should be enacted into law." 67 Cong. Rec. 463.

be held . . .". Section 3, First (i) directs that disputes growing out of grievances or the interpretation or application of agreements concerning rates of pay, rules, or working conditions be handled by conference and negotiation, including resort if necessary to the chief operating officer of the carrier. Compliance with these statutory duties is a prerequisite to appeal to the National Railroad Adjustment Board. The purpose of this legislation is the exertion of maximum pressure toward amicable settlement between the parties. Resort to the Adjustment Board is the last step in the statutory process.

In the controversy before us an amicable adjustment between the parties—the goal of the legislation—had been achieved by pursuing the course which the Act of 1934 directed. We are now asked to nullify this settlement, arrived at after prolonged negotiations, and to open the door of litigation to new discords. Not only is it sought to revive the dispute and to restore it to the status it had before the Adjustment Board more than eight years ago. The respondents claim that after all these years they have a right to repudiate their bargaining agents and to try the authority of these agents as though this were a conventional lawsuit involving the responsibility of a principal for the conduct of his agent.

As members of their Brotherhood, respondents were of course familiar with the procedure whereby the union speaks for them both to the Railroad and before the Adjustment Board. The Brotherhood's "Constitution and General Rules", which the respondents made part of their case below, are clear about this: Rule No. 7 declares that, after a grievance has been transmitted to a General Grievance Committee, that Committee "shall have power to alter, amend, add to or strike out . . . any part or all of any complaint or claim submitted to the committee, subject to appeal to the entire General Committee and/or Board of Appeals. A general grievance Committee may authorize their chairman to handle all grievances received from local lodges with the management for settlement . . .". Respondents cannot deny that the Brotherhood officials had authority to seek compliance by the railroad with the starting time agreement through the Adjustment Board. In view of the sweeping power of the General Grievance Committee to settle grievances, the settlement that was made on behalf of the Brotherhood is invulnerable. The attack on the settlement because it was signed by only two of the three members

of the Committee is frivolous. Such procedure is not at all unusual. Williams and Johnson settled other grievances in like manner, many of them involving claims for money. The Brotherhood's own rules sanction such action in that the Committee may authorize the Chairman to handle all grievances.

This is not a simple little case about an agent's authority. Demands of the employees' representative imply not only authority from those for whom he speaks but the duty of respect from those to whom he speaks. The carrier is under a legal duty to treat with the union's representative for the purposes of the Railway Labor Act. Section 2, Ninth; see *Virginian Ry.* v. *Federation*, 300 U. S. 515. We do not have the ordinary case where a third person dealing with an ostensible agent must at his peril ascertain the agent's authority. In such a situation a person may protect himself by refusing to deal. Here petitioner has a duty to deal. If petitioner refuses to deal with the officials of the employees' union by challenging their authority, it does so under pain of penalty. If it deals with them on the reasonable belief that the grievance officials of the Brotherhood are acting in accordance with customary union procedure, settlements thus made ought not to be at the hazard of being jettisoned by future litigation. To allow such settlements to be thus set aside is to obstruct the smooth working of the Act. It undermines the confidence so indispensable to adjustment by negotiation, which is the vital object of the Act. See *Division 525, Order of Ry. Conductors of America* v. *Gorman*, 133 F. 2d 273, 278.

But respondents claim that irrespective of the authority of the Brotherhood officials to handle claims for the enforcement of the agreed starting time, Williams did not have authority to present to the Adjustment Board the claim for damages due to respondents for petitioner's alleged past violation of the starting-time agreement. They insist that there is no relation between a claim for money resulting from the violation of a collective agreement and a claim for the enforcement of a collective agreement. But surely this is to sever that which is organic. It wholly disregards the nature of such a collective agreement, its implications and its ramifications. In passing on the claim for money damages arising out of the yard agreement, any tribunal would have to examine, interpret and apply the collective agreement precisely as it would if the issue were the duty to observe the agreement in the future.

An award based on the application of the collective agreement would, quite apart from technical questions of *res judicata*, affect future claims governed by the same collective agreement whatever the particular forms in which the claims may be cast. To find here merely an isolated, narrow question of law as to past liability is to disregard the ties which bind the money controversy to its railroad environment. Such a view is blind to the fact that "all members of the class or craft to which an aggrieved employee belongs have a real and legitimate interest in the dispute. Each of them, at some later time, may be involved in a similar dispute." 40 Ops. Atty. Gen., No. 59 (Dec. 29, 1942) pp. 4-5. Indeed, such a view leaves out of consideration not only the significant bearing of the construction of the same collective agreement on parts of the carrier's lines not immediately before the Court. It overlooks the relation of a provision in a collective agreement with one railroad to comparable provisions of collective agreements with other roads.

To allow the issue of authorization after an award by the Board to be relitigated in the courts is inimical to the internal government of the Brotherhood. Union membership generates complicated relations. Policy counsels against judicial intrusion upon these relations. If resort to courts is at all available, it certainly should not disregard and displace the arrangements which the members of the organization voluntarily establish for their reciprocal interests and by which they bound themselves to be governed. The rights and duties of membership are governed by the rules of the Brotherhood. Rule 10 concerns objections to official action: "Whatever action may be taken by the general grievance committee . . . shall be law to the lodges on that road until the next meeting of the board of appeals, and if any member refuses to vote or abide by the action of such general grievance committee or board of adjustment he shall be expelled from the Brotherhood for violation of obligation". To ask courts to adjudicate the meaning of the Brotherhood rules and customs without preliminary resort to remedial proceedings within the Brotherhood is to encourage influences of disruption within the union instead of fostering these unions as stabilizing forces. Rules of fraternal organizations, with all the customs and assumptions that give them life, cannot be treated as though they were ordinary legal documents of settled meaning. "Freedom of litigation, for instance, is hardly so essential a part of the democratic process that the courts should be

asked to strike down all hindrances to its pursuit. The courts are as wise, to take an example of this, in adhering to the general requirement that all available remedies within the union be exhausted before redress is sought before them as they are unwise in many of the exceptions they have grafted upon this rule." Witmer, Civil Liberties and the Trade Union (1941) 50 Yale L. J. 621, 630. To an increasing extent, courts require dissidents within a union to seek interpretation of the organization's rules and to seek redress for grievances arising out of them before appropriate union tribunals. Compare *Norfolk & W. Ry. Co.* v. *Harris*, 260 Ky. 132; *Agrippino* v. *Perrotti*, 270 Mass. 55; *Snay* v. *Lovely*, 276 Mass. 159; *Webb* v. *Chicago, R. I. & G. Ry. Co.*, 136 S. W. 2d 245. The Railway Labor Act, as the product of long experience, is a complicated but carefully devised scheme for adjusting the relations between the two powerful groups constituting the railroad industry. It misconceives the legislation and mutilates its provisions to read into it common law notions for the settlement of private rights. If, when a dispute arises over the meaning of a collective agreement, the legally designated railroad bargaining unit cannot negotiate with the carrier without first obtaining the specific authorization of every individual member of the union who may be financially involved in the dispute, it not only weakens the union by encouraging divisive elements. It grately handicaps the union in its power to bargain responsibly. That is not all. Not to allow the duly elected officers of an accredited union to speak for its membership in accordance with the terms of the internal government of the union and to permit any member of the union to pursue his own interest under a collective agreement undermines the very conception of a collective agreement. It reintroduces the destructive individualism in the relations between the railroads and their workers which it was the very purpose of the Railway Labor Act to eliminate. To allow every individual worker to base individual claims on his private notions of the scope and meaning of a collective agreement intended to lay down uniform standards for all those covered by the collective agreement, is to permit juries and courts to make varying findings and give varying constructions to an agreement inevitably couched in words or phrases reflecting the habits, usage and understanding of the railroad industry. Thus will be introduced those dislocating

differentiations for workers in the same craft which have always been among the most fertile provocations to friction, strife, and strike in the railroad world. The Railway Labor Act, one had supposed, would be construed so as to reduce and not to multiply these seeds of strife.

In order to avoid mischievous opportunities for the assertion of individual claims by shippers as against the common interest of uniformity in construing railroad tariffs, this Court so construed the Interstate Commerce Act in the famous *Abilene Cotton Oil* case, 204 U. S. 426, as to withdraw from the shipper the historic common law right to sue for an overcharge in the courts. It required resort to the Interstate Commerce Commission because not to do so would result in the impairment of the general purpose of that Act. It did so because even though theoretically this Court could ultimately review such adjudications imbedded in the various judicial judgments—if a shipper could go to a court in the first instance—there would be considerations of fact which this Court could not possibly disentangle so as to secure the necessary uniformity. The beneficent rule in the *Abilene Cotton Oil* case was evolved by reading the Interstate Commerce Act not as though it were a collection of abstract words, but by treating it as an instrument of government growing out of long experience with certain evils and addressed to their correction. Chief Justice White's opinion in that case was characterized by his successor, Chief Justice Taft, as a "conspicuous instance of his unusual and remarkable power and facility in statesmanlike interpretation of statute law." 257 U. S. xxv. The provisions of the Railway Labor Act do not even necessitate such a creative act of adjudication as this Court in the *Abilene* case unanimously accomplished. The Railway Labor Act contains no embarrassing specific provision, as was true of § 22 of the Interstate Commerce Act, 24 Stat. 379, 387, calling for subordination to the main purpose of the legislation. The considerations making for harmonious adjustment of railroad industrial relations through the machinery designed by Congress in the Railway Labor Act are disregarded by allowing that machinery to be by-passed and by introducing dislocating differentiations through individual resort to the courts in the application of a collective agreement.

Since the claim before the Adjustment Board was for money, there remains the question whether its disposition was open to ju-

dicial review. The Railway Labor Act commands that the Board's "awards shall be final and binding upon both parties to the dispute, except insofar as they shall contain a money award." Section 3, First (m). But the determination here in controversy does not "contain a money award" so as to be excepted from the final and binding effect given other awards. The obvious meaning of "money award" is an award directing the payment of money, not one denying payment. See *Berryman* v. *Pullman Co.*, 48 F. Supp. 542. We are pointed to no aids to construction that should withhold us from giving the familiar term "money award" any other than its ordinary meaning as something that awards money. This construction is confirmed by comparison with the provisions of the Interstate Commerce Act dealing with reparation orders. Since both Acts came out of the same Congressional Committees one finds, naturally enough, that the provisions for enforcement and review of the Adjustment Board's awards were based on those for reparation orders by the Interstate Commerce Commission. Compare Railway Labor Act, § 3, First (p) with Interstate Commerce Act, as amended by § 5 of the Hepburn Act, 34 Stat. 584, 590; 49 U. S. C. § 16(1), (2). If a carrier fails to comply with a reparation order, as is true of non-compliance with an Adjustment Board award, the complainant may sue in court for enforcement; the Commission's order and findings and evidence then become *prima facie* evidence of the facts stated. But a denial of a money claim by the Interstate Commerce Commission bars the door to redress in the courts. *Baltimore & Ohio R. Co.* v. *Brady*, 288 U. S. 448; *I. C. C.* v. *United States*, 289 U. S. 385, 388; *Terminal Warehouse* v. *Penn. R. Co.*, 297 U. S. 500, 507.

The Railway Labor Act precludes review of the Board's award; and, since authorization of the Brotherhood officials to make the settlement is not now open to judicial inquiry, the judgment calls for reversal.

The CHIEF JUSTICE, Mr. Justice ROBERTS and Mr. Justice JACKSON join in this dissent.